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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TOWN OF CONCORD, MASSACHUSETTS and
TOWN OF WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether public utilities, whose wholesale rates are regulated by a federal agency and whose retail rates are regulated by a state agency, enjoy a judicially created antitrust immunity under Section 2 of the Sherman Act when they impose a "price squeeze" upon their wholesale customers that compete with them in the same retail market.

2. Whether the court of appeals erred as a matter of law in overturning a jury finding of monopoly power in this case even though it was conceded that the defendant possessed monopoly power in both retail sales and transmission of electric power.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

The Town of Concord, Massachusetts and the Town of Wellesley, Massachusetts hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-33a) as amended is reported at 915 F.2d 17 (1st Cir. 1990). The opinion of the district court (App. 34a-46a) is reported at 721 F. Supp. 1456 (D. Mass. 1989).

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1990. On December 11, 1990, Justice Souter extended the time for filing a petition for writ of

certiorari to and including January 19, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful to "monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

STATEMENT

In this case, the court of appeals has created a sweeping new "dual regulation" defense to a price squeeze action brought under Section 2 of the Sherman Act, 15 U.S.C. § 2. This immunity, which has been expressly rejected by other federal courts of appeals, permits any regulated utility to avoid liability if both its wholesale and retail rates are subject to regulation. In addition, the court below adopted an erroneous rule requiring a plaintiff in a price squeeze action to demonstrate monopoly power in the wholesale market, even when the defendant has an admitted monopoly in retail sales. This is a stark departure from the principles prevailing in this Court and from the holding in one other circuit which permits a plaintiff to satisfy the monopoly power element of a Section 2 claim (including a price squeeze claim) by demonstrating monopoly power at *either* the retail or the wholesale levels.

To place these rulings in their proper context, it is necessary to explain in some detail the background of this litigation, as well as the devastating, immediate impact of the decision below on the petitioners.

1. *The Parties.* Petitioners are the Towns of Concord and Wellesley, Massachusetts ("Towns"). They are

municipal corporations that own and operate electric distribution systems and sell electric power at retail. Respondent Boston Edison Company ("Edison" or "BE") is an investor-owned, vertically-integrated power company which generates, transmits and sells electric power at both wholesale and retail. The Towns purchase virtually all of their power at wholesale from Edison. They have no generating facilities or power lines of their own linking them to other generating facilities. Nor is it economically feasible for them to construct new transmission lines of their own. For these reasons, they have always relied upon Edison's transmission lines to bring electricity to their distribution systems. The price the Towns pay for wholesale power from Edison constitutes three-fourths of their total costs of operations and directly affects the level of the Towns' retail rates.

Like most of the other 2000 municipally and cooperatively owned utilities that purchase their power at wholesale from large investor-owned utilities in this country, the Towns also compete—or attempt to compete—with Edison. See generally *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921, 930 (2d Cir. 1981). As demonstrated by the record below, this competition takes three forms. First, the Towns compete with Edison for the business of large customers (or potential customers) that are located (or are considering locating) within the Towns' service areas and have the ability, at least potentially, to switch to Edison if the Towns' retail rates increase. See App. 45a. This is sometimes called "individual customer" competition. *City of Groton*, 662 F.2d at 930. Second, the Towns compete with Edison for the business of other customers (such as Wellesley College) that are located on the boundary between service areas, and can therefore switch even more readily among providers, depending on the retail rates charged by each. App. 45a. This kind of competition is

called "fringe area competition." *City of Groton*, 662 F.2d at 930. Third, in the long run, the Towns are in competition with Edison simply to retain the ability to serve the residential customers located in the Towns' service areas, which are surrounded by Edison's retail service area. App. 45a. Obviously, if the Towns' retail rates became excessive by comparison to Edison's rates, the Towns would be forced to abandon their independent systems. This brand of competition is known as "franchise competition." *City of Groton*, 662 F.2d at 930.

Staying competitive with Edison is obviously important to the Towns. The more power the Towns sell to residential, commercial and industrial customers—*i.e.*, the more kilowatt hours of electricity there are over which the Towns' fixed costs can be spread—the lower the Towns' rates can be. But, inasmuch as the Towns purchase virtually all of their wholesale power from Edison, their ability to compete with Edison depends critically upon the relationship between Edison's retail rates and its wholesale rate, which includes a component for transmitting electricity as well as generating it.

2. *Edison's Price Squeeze.* In 1980, the Towns and Edison entered into an agreement which provided that Edison could not increase the Towns' wholesale rates prior to the time Edison had obtained an increase in its retail rates. See *Towns of Wellesley, Concord & Norwood* v. *FERC*, 786 F.2d 463 (1st Cir. 1986). Under this "sequencing" provision, the Towns' wholesale rates remained in balance with Edison's retail rates. Another provision permitted the Towns readily to acquire a small quantity of outside power without incurring an increase in Edison's wholesale rates. Early in 1984, Edison notified the Towns that it was cancelling both provisions, effective early in 1985. About this time, the Towns, after a long proceeding, were awarded a small

allocation of federal preference power from the Power Authority of the State of New York ("PASNY"). *Massachusetts Municipal Wholesale Elec. Co.* v. *PASNY*, 30 FERC ¶ 61,323 (March 27, 1985), Joint Appendix at 2845-65 (hereafter "J.A."); App. 36a.

During this period, Edison, which had been denied an allocation of PASNY power, took a number of steps which substantially impeded the Towns' ability to compete with Edison in the retail electricity market:

First, in late 1984, Edison filed a wholesale rate increase with FERC. This "S-8" increase, as it is known, increased the Towns' wholesale rate a total of 8.5%. App. 36a. Pursuant to standard FERC practice, this rate increase was permitted to go into effect, subject to later adjudication and refund. *Id.* Edison's corresponding retail rate increase was only 3.85%. J.A. 1333.[1]

Second, after July 1, 1985, when the Towns began receiving approximately five percent of their power from PASNY, Edison continued to charge them as if they were receiving 100% of their power from Edison. App. 36a. This, of course, would have had the same effect as

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[1] At the time Edison made this wholesale rate filing, it knew that it was filing for a higher profit on its wholesale sales than it earned on its retail sales. J.A. 1350-53; see J.A. 1310-11, 1334, 1337-40, 1345-46, 3490. Three years later, the FERC ruled that a substantial portion of the S-8 wholesale rate increase was unjustified. *Boston Edison Co.*, 42 FERC ¶ 61,374 (March 25, 1988), reh'g denied, 43 FERC ¶ 61,309 (May 25, 1988), aff'd, 885 F.2d 962 (1st Cir. 1989). Edison, however, continued to collect that rate through the simple expedient of refiling the same rate in a new or "pancaked" rate filing. J.A. 2734-2805. Most recently, on December 7, 1990, Edison filed a new wholesale rate that is 29 percent higher than the S-8 wholesale rate that the FERC previously found unjust and unreasonable. Thus, because of Edison's manipulation of FERC procedures, the Towns' success in having Edison's S-8 rate overturned by the FERC has failed to end Edison's price squeeze.

a wholesale rate increase of approximately five percent on the power purchased from Edison.

Third, in 1986, Edison sent the Towns a letter citing a five-year notice provision of Edison's FERC tariff and stating that, because the Towns had taken PASNY power when it became available in 1985, Edison would assess an "adverse financial impact" charge of almost $1 million against the Towns. App. 37a. This too was designed to effect a substantial increase in the wholesale charges paid for Edison power. It also had a chilling effect on efforts by the Towns to obtain power from any other source.

Fourth, also in 1986, Edison filed another new wholesale rate increase against the Towns. The new rate, known as the S-8 PR rate, incorporated Edison's old S-8 rate as a new rate, thus immunizing the rate from any change by decisions rendered in the Towns' challenge to the S-8 rate. It also increased the Towns' wholesale charges slightly. J.A. 2734-2805. This increase was not accompanied by any comparable increase in Edison's retail rates. App. 36a; see J.A. 973-74, 1359-63, 2995.

Fifth, in late 1986 and early 1987, Edison filed additional wholesale rate increases against each town, which raised their wholesale power costs an additional 4.4%. In this filing, Edison sought FERC approval to charge the Town of Wellesley $761,000 for a new piece of transformer equipment for which, according to a subsequent ALJ decision, Wellesley was not responsible. App. 37a. Again, there was no comparable corresponding increase in Edison's retail rates. J.A. 612, 662-64, 2995.

Sixth, later in 1987, Edison reduced its retail rates in response to the reduction in Edison's federal corporate tax rate that resulted from the Tax Reform Act of 1986. App. 36a. Edison, however, did not reduce its wholesale rates at that time. *Id.*

As a result of these actions by Edison, the Towns experienced an increase in their wholesale rates that was more than three times the increase in Edison's retail rates. These actions forced the Towns to raise their retail rates, including rates to their large retail customers, which made the Towns' rates higher than Edison's rates for large retail customers. They also forced the Towns to delay plant improvements and wage increases for employees. They caused the Towns to incur losses. Finally, Edison's price squeeze reduced the Towns' ability to compete with Edison in attracting new business, and in retaining existing businesses and customers. App. 37a. In sum, Edison had squeezed the wholesale and retail rates in a way that was designed to impair, and did impair, the Towns' ability to compete in the retail market.

3. *The Towns' Lawsuit.* In 1987, the Towns filed an antitrust lawsuit challenging Edison's anticompetitive actions. Among other things, the Towns asserted a monopolization claim under Section 2 of the Sherman Act. Under Judge Learned Hand's landmark decision in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"), a monopolization claim has two elements: first, the defendant possesses monopoly power in a relevant market; second, the defendant has engaged in exclusionary conduct or committed other "purposeful acts" to acquire, maintain, or expand its monopoly position. See, *e.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966) (adopting *Alcoa*).

At their jury trial, the Towns presented extensive evidence concerning Edison's market power. The Towns' experts testified that the relevant market is Edison's service area, where it provides electricity to customers at both retail and wholesale and competes with the Towns for customers. These experts demonstrated that Edison controls 98 percent of that market. The Towns also presented evidence demonstrating that Edison had monopoly power over the product submarket of "firm re-

quirements" wholesale power, upon which the Towns were dependent, and over the transmission of electricity to the Towns.

The Towns also presented extensive evidence on the second element of their monopolization claim—exclusionary conduct. Among other things, they demonstrated that Edison had taken each of the six steps, described above, to charge the Towns a higher wholesale rate in relation to costs than it does to its own retail customers. App. 35a-37a. Thus, Edison put the Towns in a price squeeze that undermined the Towns' ability to compete with Edison for retail customers. App. 41a.

After 13 days of testimony, the case was submitted to the jury. The district court propounded three special interrogatories: (1) "Do you find that plaintiffs proved the existence of a relevant market?" (2) "Do you find that defendant had monopoly power in the relevant market?" and (3) "Do you find that defendant willfully acquired or maintained that power through restrictive or exclusionary conduct?" App. 40a n.2; J.A. 394. After deliberating three days, the jury answered "Yes" to all three questions. It then returned a verdict of $13.1 million for the Towns.

4. *The District Court's Decision.* The trial court denied Edison's motion for judgment notwithstanding the verdict. A centerpiece of Edison's motion was a legal attack on the Towns' price squeeze claim. Edison argued that, because its wholesale and retail rates are regulated by federal and state authorities, respectively, Edison could not be subject to liability based on a claim that the relationship between those rates had created a price squeeze. App. 41a; see also Boston Edison Company's Memorandum in Support of Motion For Judgment Notwithstanding Verdict, pp. 9-13 ("JNOV Motion").

After observing that the Towns had presented ample evidence of a price squeeze "resulting from the interplay

of [Edison's] wholesale and retail rates" (App. 41a), the court rejected Edison's "dual regulation" defense. The court noted (App. 42a-43a) that the Eighth Circuit had rejected an "identical" legal challenge in *City of Kirkwood* v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983).

Edison also argued that the Towns had failed to demonstrate monopoly power in a relevant market. It admitted that it had monopoly power over both retail sales and transmission. JNOV Motion at 6 ("Boston Edison . . . does have a retail monopoly in its service area"); Reply In Support Of JNOV Motion at 6-7. However, it strenuously argued that in a price squeeze case the retail market cannot, as a matter of law, constitute the relevant market. JNOV Motion at 5-6. Quoting the Third Circuit's decision in *Borough of Lansdale* v. *Philadelphia Elec. Co.*, 692 F.2d 307, 312 (3d Cir. 1982), Edison contended that " 'the question of monopoly power within the retail product market is irrelevant . . . under the 'price squeeze' theory.' " JNOV Motion at 6.

The district court rejected these arguments as well. It held that, through their expert testimony and other evidence, "the Towns presented substantial evidence from which the jury could conclude that the relevant market is [Edison's] service area . . . ." App. 41a. It observed that the relevant market, in an antitrust case such as this one, is normally the defendant's *retail* service area—*i.e.*, "the area[] in which the particular firm actually competes or operates." App. 40a (quoting *City of Mishawaka* v. *American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981), aff'g 465 F. Supp. 1320, 1325 (N.D. Ind. 1979)). It further observed that this approach comports with this Court's decision in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 369-70 (1973). App. 40a.

5. *The Court of Appeals' Opinion.* Although Edison initially declined to make its "dual regulation" argument

on appeal, the court of appeals called for supplemental briefing on that question after oral argument. App. 47a. It then reversed the district court's decision. It held 1) that there is a "dual regulation" immunity from a price squeeze monopolization claim; 2) that an antitrust plaintiff alleging such a squeeze must demonstrate monopoly power in the wholesale market, rather than the retail or transmission market; and 3) that the Towns had failed as a matter of law to demonstrate a monopoly in the broad wholesale market defined by the court.

According to the court of appeals, "[t]he chief question raised by this appeal is whether a pricing practice known as a price squeeze violates the antitrust laws when it takes place in a fully regulated industry." App. 2a. The court then held that, subject to an undefined potential exception for "extreme circumstances," it does not. App. 2a, 11a-12a, 23a-24a. It thereby adopted the "dual regulation" immunity that had been explicitly rejected by the district court and by the Eighth Circuit in *Kirkwood*.

The panel acknowledged that it was "aware that reported opinions in three circuit courts of appeals and several district courts suggest that a price squeeze may be unlawful in the regulated electricity industry." App. 23a. The panel continued: "[W]e recognize that our reasoning and analysis differ[] significantly from that in the opinions . . . just cited." *Id.* at 24a-25a. The panel also acknowledged that in one of those cases—the Seventh Circuit's decision in *City of Mishawaka* v. *American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981)—"the court actually . . . affirm[ed] a judgment against the defendants." App. 24a.

The court of appeals did not rest its holding exclusively on the immunity issue. Instead, after devoting a significant amount of effort to justifying that holding (App. 18a-25a), the court also identified "[a] second, legally fatal problem," *viz.*, that the Towns had failed to estab-

lish monopoly power in what the Court defined as the relevant wholesale market. The court acknowledged that Edison has a monopoly over transmission of electricity to the Towns (App. 25a), and Edison itself conceded that it has a monopoly over retail sales in the area where it and the Towns compete for retail customers. See *supra* page 9.

The court of appeals argued that Edison's admitted monopoly over transmission is insufficient to satisfy the monopoly power element of a Section 2 claim because, according to the court, Edison is willing to "wheel" or transmit electricity upon request. App. 25a. Moreover, the court agreed with Edison that monopoly power at the retail level is insufficient as a matter of law. It held that "a price squeeze violates Sherman Act § 2 . . . when (1) the firm conducting the squeeze has monopoly power at the *first* [*i.e.*, wholesale] industry level. . . ." App. 3a (emphasis added); see also *id.* at 25a ("price squeeze occurs when a monopolist uses its control over the *monopolized* product . . . to *obtain* a monopoly at a *second* [retail] industry level") (emphasis added). Accordingly, the court of appeals refused to give effect to the district court's holding that Edison's monopoly over retail sales within its service area was sufficient to satisfy the monopoly power element of the Towns' Section 2 claim.[2]

6. *Aftermath of the Court of Appeals' Decision.* Shortly after the court of appeals issued its decision, Edison filed with the FERC a new wholesale rate schedule, which increased the Towns' wholesale rates to a level 29% higher than the unwarranted S-8 rates. The par-

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[2] The court of appeals further held, contrary to the holding of the district court, that the Towns had failed to present evidence sufficient to sustain a jury finding of monopoly power in the wholesale market. The court rejected, with no explanation whatever, the relevant geographic market accepted by the district court. Instead, the panel concluded that, as a matter of law, the relevant market must include *all* of the "more than a dozen different power generating companies [that] sell wholesale power in New England . . . ." App. 26a.

allel increase in retail rates, however, was only 4%. Edison thereby further exacerbated the now unremedied price squeeze and extended its Section 2 violation into the foreseeable future.

REASONS FOR GRANTING THE PETITION

This petition presents two important antitrust issues that warrant review by this Court. Most obviously, the court of appeals acknowledged that its decision to create a "dual regulation" immunity from price squeeze claims conflicts with decisions in other circuits. But equally important, its holding that a plaintiff in a price squeeze case must demonstrate monopoly power at the wholesale level rather than the retail level conflicts with the decision of the Seventh Circuit in *City of Mishawaka* v. *American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980) (*"Mishawaka II"*), cert. denied, 449 U.S. 1096 (1981), and conflicts in principle with this Court's decision in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973).

The First Circuit's resolution of both issues will have an enormous practical effect on the ability of more than 2000 municipal electric companies, electric cooperatives, and similarly situated enterprises in other industries to compete with their suppliers. By ruling that a price squeeze is not exclusionary when undertaken by regulated utilities, moreover, the decision below would logically preclude any consideration by the FERC of price squeeze claims in the future, thereby negating this Court's decision in *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976).

1. The court of appeals' principal holding, *i.e.*, that a public utility subject to dual regulation is entitled to immunity from price squeeze claims, presents an issue as to which there exists a square and acknowledged conflict among the circuits. The court of appeals itself stated (App. 24a-25a) that its holding was in direct conflict with the Seventh Circuit's decision affirming a price squeeze

judgment against an electric utility in *Mishawaka II*. Indeed, *Mishawaka II* expressly rejected the "dual regulation" immunity proposed by Edison and adopted by the First Circuit here.[3] The court stated:

> In this case, we are considering an industry subject to both federal and state regulation. However, we do not believe that that circumstance justifies an antitrust exemption . . . .

616 F.2d at 985. The Seventh Circuit reached a similar conclusion in rejecting the application of more traditional antitrust immunity doctrines in an earlier Mishawaka case, *City of Mishawaka* v. *Indiana & Michigan Elec. Co.*, 560 F.2d 1314 (7th Cir. 1977) ("*Mishawaka I*"), cert. denied, 436 U.S. 922 (1978).

The court below also acknowledged (App. 24a) that its "reasoning and analysis differ[] significantly from that in" a number of other opinions, including the Eighth Circuit's decision in *City of Kirkwood* v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983), and the Second Circuit's decision in *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981). In fact, as the district court recognized (App. 42a-43a), the Eighth Circuit in *Kirkwood* squarely

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[3] Although the First Circuit acknowledged a square conflict with *Mishawaka II*, the court nonetheless weakly attempted to distinguish *Mishawaka II* on its facts. App. 24a. Both grounds for distinction rest upon false factual premises. First, as in *Mishawaka II*, the Towns presented ample evidence of exclusionary activity in addition to the price squeeze. Indeed, as the court below recognized elsewhere, the Towns presented evidence that Edison had also used its undisputed monopoly control over the transmission of electricity to put the Towns at a competitive disadvantage. App. 25a-26a. Second, as in *Mishawaka II*, the Towns showed that, in the words of the district court, "the wholesale rates [Edison] charges them are effectively higher than what [Edison] charges some of its larger retail customers." App. 37a. The court of appeals did not overturn this conclusion. It merely asserted, without any support, that it was "in doubt." App. 24a.

rejected the dual regulation immunity theory proposed by Edison and adopted by the panel below. After analyzing this Court's decisions, including *Otter Tail*, and *Conway Corp.*, and discussing the limitations on federal and state ratemaking authority, the Eighth Circuit concluded that the FERC and the state regulatory body "do not have exclusive jurisdiction over Kirkwood's price-squeeze claim." 671 F.2d at 1178. Accordingly, the court held that "a municipality's price-squeeze claim is cognizable under the antitrust laws." *Id.* at 1177 n.8.[4]

In addition, the court of appeals' analysis of the immunity issue is utterly misguided. Most fundamentally, the court of appeals ignored the well settled rule that implied antitrust immunity is "strongly disfavored," and is appropriate "only . . . in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963). See also *Gordon* v. *New York Stock Exch.*, 422 U.S. 659, 683 (1975) (immunity to be "implied only if necessary to make [the regulatory statute] work, and even then only to the minimum extent necessary") (quoting *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 357 (1963)). As the Solicitor General stated in a brief filed at the invitation of this Court in *Kirkwood*:

> [N]o implied exemption should be found in this case because . . . there is no 'clear repugnancy' between

[4] Contrary to the court of appeals' suggestion (App. 23a-24a), the fact that *Kirkwood* did not actually affirm a judgment against a regulated utility does not diminish the conflict between *Kirkwood* and the decision below. The Eighth Circuit's rejection of a "dual regulation" immunity from price squeeze claims was plainly necessary to the court's judgment reversing the district court's grant of summary judgment in favor of the utility defendant in that case. See 671 F.2d at 1177. Immunity was one of the independent grounds on which the district court had granted summary judgment. The Eighth Circuit therefore could not have reversed the judgment if it had applied the rule adopted by the First Circuit in the decision below.

> the Federal Power Act and the application of the Sherman Act to the conduct at issue. There is no indication in the language or legislative history of the Federal Power Act that it was intended to authorize a price squeeze. Nor is there any inherent inconsistency between the requirement of the Federal Power Act that rates be 'just and reasonable' and the application of Section 2 of the Sherman Act to price squeezes. Thus, as in *Otter Tail*, the conduct at issue here remains subject to the Sherman Act.

Brief for the United States as Amicus Curiae, No. 81-2278 at 9-10, *Union Elec. Co.* v. *City of Kirkwood* (December 1982) (footnotes omitted).

The court of appeals' holding also rests upon an erroneous view of the proper role, as well as the limitations, of rate regulation at the state and federal levels. The court of appeals' conclusion that a price squeeze is rarely anticompetitive in a regulated industry was based in large measure upon the court's view that dual regulation minimizes the competitive harm that can be done by a price squeeze. App. 18a-25a. But that conclusion ignores three crucial facts.

First, there are wide "gaps" in the authority of the two regulatory systems. As the Eighth Circuit correctly observed in *Kirkwood*, the FERC and the state regulatory agency "each has authority over only one end of the alleged price squeeze." 671 F.2d at 1178. And, as the Department of Justice observed to this Court in *Kirkwood*, "[a]ll that FERC can do prospectively is to adjust the wholesale rate within the zone of reasonableness." Brief for the United States, *supra*, at 12. "If this is inadequate to remedy a price squeeze," the Department continued, "FERC cannot compel a utility to file higher retail rates." *Id.* By the same token, a state regulatory body cannot order the utility to file lower wholesale rates. Therefore, as the Eighth Circuit correctly reasoned, only "the antitrust laws can address the entire problem." *Kirkwood*, 671 F.2d at 1178.

Second, a regulated electric utility can easily circumvent a finding by the FERC that its wholesale rates are unjust and unreasonable—and continue a price squeeze against a competing distributor—simply by making a new, "pancaked" rate filing. *E.g.*, *Mishawaka II*, 616 new, "pancaked" rate filing. *E.g.*, *Mishawaka II*, 616 F.2d at 982. Indeed, that is precisely what happened here even though the FERC held that Edison's original S-8 wholesale rate was unjustified. See *supra* note 1. Despite the FERC's decision, Edison has continued to collect its originally-filed wholesale rate for more than six years. Thus, Edison's own actions illustrate the recent observation of the district court in *Cities of Anaheim* v. *Southern California Edison Co.*, 1990-2 Trade Cases (CCH) ¶ 69,246 at 64,900 (C.D. Cal. 1990): "By manipulating the timing and amount of its rate filings, it is possible for the utility to ensure that the rates of its wholesale customers are unjustifiably high in relation to the rates of its retail customers."

Third, the FERC never considers the issue of anticompetitive intent essential to a § 2 violation (*Missouri Power & Light Co.*, 5 FERC ¶ 61,086 at 61,140 n.17, 61,141 (Oct. 27, 1978)), and never reviews the level of wholesale rates *as filed* under its limited price squeeze powers. *Southern California Edison Co.*, 40 FERC ¶ 61,371 at 62,168 (Sept. 30, 1987); see *Arkansas Power & Light Co.*, 8 FERC ¶ 61,131 at 61,510 (Aug. 6, 1979). As the D.C. Circuit has noted, these are matters left to the traditional remedy of the antitrust laws. *Cities of Batavia* v. *FERC*, 672 F.2d 64, 88-89 (D.C. Cir. 1982). These two matters were essential elements of the Towns' claims against Edison.

In sum, the dual regulatory system provides an "obvious, ready made illegal opportunity with a legitimate gloss." *Mishawaka II*, 616 F.2d at 983-84.[5] For that

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[5] See also R. Bork, *The Antitrust Paradox* 347 (1978) ("Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition.").

reason, both the Seventh and Eighth Circuits, as well as the Department of Justice, have squarely rejected the position of the court below that dual regulation renders antitrust price squeeze actions unnecessary. As the Department stated in its *Kirkwood* brief, "the availability of antitrust relief provides a *necessary* complement to FERC's limited power to remedy a price squeeze." Brief for the United States, *supra*, at 12 (emphasis added).

2. Obviously aware of the breadth and importance of its holding on the immunity question, the court of appeals apparently attempted to find a less sweeping, alternative basis for reversing the district court's decision. It thus held, almost as an afterthought, that the Towns had failed to satisfy the monopoly power element of a monopolization claim. Given Edison's *admitted* monopoly power in both retail sales and in transmission of electricity (*supra* page 9), this is a remarkable holding. It also presents significant legal issues that independently warrant review by this Court.

Most important, the court of appeals' preliminary holding that a plaintiff in a price squeeze suit must show monopoly power at the wholesale level further solidified a conflict among the circuits. As Edison correctly argued below (*supra* page 9), the Third Circuit has held that, in a price squeeze action, "the question of monopoly power within the retail product market is irrelevant . . . ." *Borough of Landsdale* v. *Philadelphia Elec. Co.*, 692 F.2d 307, 312 (3d Cir. 1982). Accordingly, that court held that the "inquiry need focus only on the definition of the relevant geographic market for wholesale power." *Id.* As a result of the decision below, this position has now become the law of the First and Third Circuits.[6]

The Seventh Circuit held in *Mishawaka II* that establishment of monopoly power at *either* the wholesale or

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[6] Of course, the more basic holding in *Lansdale*—that definition of the relevant geographic market is an issue for the jury—directly conflicts with the holding of the First Circuit below taking this issue from the jury. See *infra* note 7.

retail level satisfies the monopoly power requirement of Section 2. There, the district court found that the plaintiffs had produced evidence tending to show that the "defendants possess monopoly power in two respects"—"retail sales of electricity" and "the supply of electric power . . . on which the plaintiffs depend to serve their customers and to compete with [defendant] for retail sales." *City of Mishawaka* v. *American Elec. Power Co.*, 465 F. Supp. 1320, 1325 (N.D. Ind. 1979). The court then held that "[e]stablishment of either monopoly brings the monopolization provision of Section 2 into operation." *Id.* With the sole exception of damage calculations, the Seventh Circuit affirmed all of the district court's holdings. 616 F.2d at 980, 985.

The First Circuit's insistence on a showing of monopoly power at the wholesale level squarely conflicts with the prevailing rule in the Seventh Circuit. This conflict was explicitly noted recently by the district court in *Cities of Anaheim*, 1990-2 Trade Cases ¶ 69,246 at 64,899 (contrasting the approaches of *Mishawaka* and *Lansdale*; acknowledging confusion in applying traditional antitrust analysis to price squeeze claims).

The rule applied by the court below is wrong as a matter of law, quite aside from the court of appeals' erroneous analysis of Edison's monopoly power at the wholesale level.[7] First, the court of appeals' requirement of a

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[7] The court of appeals' analysis of Edison's monopoly power at the wholesale level rested largely upon the court's redefinition of the relevant market. See *supra* note 2. Numerous other courts of appeals, however, have held that the definition of the market is a question for the jury to decide. See, *e.g.*, *Lansdale*, 692 F.2d at 311-12; *Syufy Enter.* v. *American Multicinema, Inc.*, 793 F.2d 990, 994 (9th Cir. 1986), cert. denied, 479 U.S. 1031 (1987); *Weiss* v. *York Hospital*, 745 F.2d 786, 825-26 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985); *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1348-50 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981). As the district court recognized, moreover, courts (and juries) in similar cases have typically defined the relevant whole-

wholesale monopoly is contrary to *Otter Tail*. There, this Court held that an integrated power company with a monopoly at the retail level violated Section 2 by unlawfully preserving its retail monopoly when it excluded potential rivals from "obtaining electric power from outside sources of supply." 410 U.S. at 377. Significantly, neither this Court nor the district court so much as hinted that a finding of monopoly power at any other level was necessary before the plaintiffs could make out a violation of Section 2. See *United States* v. *Otter Tail Power Co.*, 331 F. Supp. 54, 58-59 (D. Minn. 1971) (finding defendant has monopoly in sale of electric power at retail; relevant geographic market is defendant's service area), aff'd, 410 U.S. at 369-70 & n.1. In contrast to the decision below, the Seventh Circuit's holding that a retail monopoly satisfies the monopoly power element of Section 2 is fully consistent with *Otter Tail*.

Second, the rule adopted by the court below ignores the fact that a price squeeze may be implemented to preserve an existing retail monopoly as well as to extend an existing wholesale monopoly to the retail level. In the *Alcoa*-type case where a plaintiff demonstrates monopoly in the wholesale market, evidence of a price squeeze

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sale market in precisely the way the First Circuit says it may not be defined in this case. See App. 40a-41a (citing *Otter Tail*, *supra*; *Mishawaka II*, *supra*).

In addition, the court of appeals' analysis of Edison's monopoly power at the wholesale level depends upon the same misguided view of the ability of federal and state rate regulation to curb the acquisition and exercise of monopoly power. Thus, the court ignored the exclusionary power of respondent's "adverse impact" charge because the Towns "remain free to challenge before FERC any unreasonably high charge that Edison might try to assess under this provision." App. 28a. Because the court of appeals' analysis of Edison's wholesale monopoly power is so closely tied to its analysis of Edison's proposed dual regulation defense, a reversal of the court of appeals' holding with respect to the latter issue also would lead to a reversal of the holding with respect to monopoly power.

tends to show that the defendant purposefully and willfully *abused* its monopoly position in the wholesale market in an effort (whether successful or not) to acquire market power in the retail market. See, *e.g.*, *Alcoa*, 148 F.2d at 437-38; *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 31 & n.43 (3d Cir.), cert. denied, 439 U.S. 876 (1978); see also *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927); *Industrial Bldg. Materials, Inc.* v. *Interchemical Corp.*, 437 F.2d 1336, 1342 (9th Cir. 1970).

However, where (as here) a plaintiff who competes with the defendant at the retail level demonstrates that the defendant has monopoly power at that level, a price squeeze serves the same function as did the refusal to deal and the denial of access to an "essential facility" in *Otter Tail*: it shows an intent unlawfully to *maintain* the defendant's retail monopoly against encroachment from a competitor. *E.g.*, *Otter Tail*, 410 U.S. at 377 (willful maintenance of retail monopoly power sufficient to satisfy "purposeful act" element); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) ("willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident"). Edison's admitted monopoly over retail sales in its service area, therefore, is sufficient to satisfy the monopoly power element of the Towns' Section 2 claim.

The court below also erred in concluding that Edison's admitted monopoly over transmission is insufficient to satisfy the monopoly power requirement of Section 2. The charges Edison imposes for the transmission services it provides to the Towns are included in its wholesale rates. J.A. 1197-1204, 1244-46, 3388-89, 3472-88. Any manipulation of Edison's wholesale rates for anticompetitive or exclusionary purposes, therefore, represents an abuse of Edison's transmission monopoly as well as its monopoly over wholesale sales of the electric power it generates.

See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

The court of appeals attempted to circumvent the legal effect of Edison's admitted transmission monopoly by claiming that "Boston Edison will 'wheel' (*i.e.*, transmit) electricity from other producers to any distributor upon request, all for a nominal transmission charge that no one claims is unreasonably high." App. 25a-26a. This claim misses the point. Even if the court of appeals' characterization were true, the fact that Edison refrained from abusing its transmission monopoly in one way—*i.e.*, by refusing to deal, as in *Otter Tail*—does not absolve it of liability for abusing its transmission monopoly in another way—*i.e.*, by imposing a price squeeze on the Towns.

In this respect, the court of appeals' analysis stands in stark contrast to the analysis of the Second Circuit in *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981). In that case, the court of appeals expressly held that the utility had willingly wheeled electricity over its transmission system. See 662 F.2d at 932-33. Nevertheless, the court held that a price squeeze was a separate abuse of the utility's monopoly power that could properly give rise to a claim under Section 2. *Id.* at 934; see also *City of Chanute* v. *Kansas Gas & Elec. Co.*, 754 F.2d 310 (10th Cir. 1985) (municipalities allowed to proceed on antitrust claims even though utility was willing to wheel electricity).

In sum, previous decisions of other courts of appeals applying *Otter Tail* have correctly held that a demonstration of monopoly power in retail electric sales or in electricity transmission is sufficient, as a matter of law, to satisfy the monopoly power element of a Section 2 claim. Those courts have made it clear that proof of a wholesale monopoly is not required. Accordingly, the court of appeals' holding that the Towns' proof on this issue was insufficient presents a square conflict in the in-

terpretation of Section 2 that warrants review by this court.

3. The issues presented by the decision below are of great practical importance. Of most immediate concern to the Towns is the fact that Edison, in the wake of the court of appeals' decision, has implemented a new wholesale price increase of over 29 percent above the unjustified S-8 filing, far more than the 4% increase in Edison's retail rates. It will therefore make it virtually impossible for the Towns to compete with Edison at retail for existing or new customers. Indeed, it will threaten the very viability of their electric distribution operations.

Aside from its immediate, devastating effect on the Towns, the decision below, by endorsing a sweeping implied immunity to Section 2 liability, will have far-reaching effects on the economy and the development of antitrust law nationwide. In principle, the court of appeals' decision forecloses price squeeze claims against interstate natural gas transmission companies and many communications companies (in particular, the so-called "local exchange carriers") as well as electric utilities. At a minimum, therefore, it will place all of the more than 2000 municipal and cooperative electric companies that compete with their principal suppliers at a severe competitive disadvantage. Today, those companies serve approximately 62 million customers. See Public Power, 1991 Directory Issue, at 53. The decision below will also prevent Section 2 price squeeze actions by federal and state governments as well as private parties. And it will undermine this Court's decision in *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976), by undermining the legal basis for consideration of price squeeze claims by the FERC.

Similarly, the court of appeals' requirement that a plaintiff in a Section 2 price squeeze action must always demonstrate monopoly power at the wholesale level will effectively immunize many companies with retail and transmission monopolies from Section 2 scrutiny. Be-

cause there is no legitimate basis for permitting a monopolist to maintain or abuse its monopoly power by squeezing out its retail competitors, this holding of the court of appeals also warrants review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 22, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 89-1872

TOWN OF CONCORD, MASSACHUSETTS, *et al.*,
Plaintiffs, Appellees,

v.

BOSTON EDISON COMPANY,
Defendant, Appellant.

Heard April 5, 1990

Decided Sept. 21, 1990

William L. Patton with whom Robert J. Stillman, Ropes & Gray, Boston, Mass., George F. Bruder, Carmen L. Gentile, Bruder, Gentile & Marcoux, Washington, D.C., John J. Desmond, III and Jeffrey N. Stevens, Boston, Mass., were on brief, for defendant, appellant.

Charles F. Wheatley, Jr., with whom Don Charles Uthus, Peter A. Goldsmith, Annapolis, Md., Timothy P. Ingram, Arlington, Va., Pace J. McConkie, Allen D. Freemyer, Wheatley & Ranquist, Salt Lake City, Utah, Charles R. Parrott, Nutter, McClennen & Fish, Boston, Mass., Albert S. Robinson, and Grindle, Robinson & Kertzman, Wellesley, Mass., were on brief, for plaintiffs, appellees.

Before BREYER, Chief Judge, and CAMPBELL and SELYA, Circuit Judges.

BREYER, Chief Judge.

The chief question raised by this appeal is whether a pricing practice known as a price squeeze violates the antitrust laws when it takes place in a fully regulated industry.

To understand the nature of a price squeeze the reader must keep three basic facts in mind. First, a firm can engage in a price squeeze only if it operates at two levels of an industry, and only if its competitors at one level are also its customers. Alcoa, the defendant in a famous antitrust case, provides an example of such a firm. *See United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945) (*Alcoa*). For several decades, Alcoa controlled the domestic production of almost all of America's aluminum ingot. It sold its ingot to independent fabricators, some of whom turned the ingot into aluminum sheet; it also fabricated sheet itself. Both Alcoa and the independents sold the finished sheet to the same group of consumers. Alcoa, therefore, operated at two levels of the aluminum business—ingot production and sheet production—and it competed with its customers (the independent sheet fabricators) at the second level.

Second, a price squeeze occurs when the integrated firm's price at the first level is too high, or its price at the second level is too low, for the independent to cover its costs and stay in business. Suppose, hypothetically, that Alcoa's price for ingot was $100 per ton; that the independents' costs of fabricating ingot into sheet was $50 per ton; and that Alcoa's price for sheet was $145 per ton. Under these circumstances, the independents, with ingot costs of $100 and fabricating costs of $50, would have no "room" to make a profit, for they could not charge more than $145 for sheet without losing all of their business to Alcoa. Alcoa's prices of $100 for in-

got and $145 for sheet would squeeze the independents out of business.

Third, Judge Learned Hand, in *United States v. Aluminum Co.*, *supra*, wrote that a price squeeze violates Sherman Act § 2, 15 U.S.C. § 2(a), when (1) the firm conducting the squeeze has monopoly power at the first industry level, (2) its price at this level is "higher than a 'fair price,'" and (3) its price at the second level is so low that its competitors cannot match the price and still make a "living profit." *See id.* at 437-38. Other courts, using substantially similar language, have reached the same conclusion. *See, e.g., Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 808-11 (3d Cir. 1984), *cert. denied*, 477 U.S. 908, 106 S.Ct. 3284, 91 L.Ed.2d 572 (1986); *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553 (2d Cir.1977); *Carl Hizel & Sons, Inc. v. Browning-Ferris Indus., Inc.*, 600 F.Supp. 161, 161-62 (D.Colo. 1985).

This case raises a narrow question about the price squeeze theory of antitust liability: does Sherman Act § 2 forbid a governmentally regulated firm with *fully regulated* prices—prices that are regulated at both industry levels—from asking regulators to approve prices that could create a price squeeze? Despite language in some cases suggesting that the answer is yes, *see* pp. 28-29, *infra*, our analysis of the likely effects of a price squeeze in a fully regulated industry leads us to conclude that the answer is no. Effective price regulation at both the first and second industry levels makes it unlikely that requesting such rates will ordinarily create a serious risk of significant anticompetitive harm. At the same time, regulatory circumstances create a significant risk that a court's efforts to stop such price requests will bring about the very harms—diminished efficiency, higher prices—that the antitrust laws seek to prevent. We conclude, therefore, that price regulation will, in most cases, pre-

vent a price squeeze from constituting an "exclusionary practice" of the sort that Sherman Act § 2 forbids.

We also conclude that, regardless, the plaintiffs in this particular case did not demonstrate the existence of an unlawful exclusionary practice, for evidence does not support a critical jury finding. It does not show that the defendant, Boston Edison, possessed monopoly power in the primary product market.

For these reasons, we reverse a judgment in favor of the plaintiffs.

I

Background

The private firms that supply American homes and businesses with electricity are called "investor-owned utilities." Most of these firms are fully integrated, operating at all three levels of the electric power industry: (1) they *produce* (or generate) electricity, (2) they *transmit* electricity from generators to local distributors, and (3) they *distribute* electricity at the local level. *See generally* Joskow, *Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition*, in *Antitrust and Regulation* 175-78 (F.M. Fisher ed. 1985) [hereinafter *Joskow*]; Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 Colum. L. Rev. 64, 67-69 (1972) [hereinafter *Meeks*]. Despite being fully integrated, these firms typically do not distribute only electricity that they themselves have generated. Rather, in many parts of the country, groups of firms have formed power "pools" through which they coordinate the generation, transmission, and distribution of electricity throughout a large geographical area. These pooling arrangements aim to enhance reliable and efficient electric service by matching customer demands (which change minute by minute) with available low-cost supply sources. As a result of power pooling, an

integrated utility will often wind up distributing electricity generated by a different, interconnected company. *See generally* 16 U.S.C. § 824a-1 (governing pooling agreements); *New England Power Pool Agreement*, 56 F.P.C. 1562 (1976) (describing the New England Power Pool), *petitions for review denied*, *Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978); C. Phillips, Jr., *The Regulation of Public Utilities* 585-92 (1988) (discussing coordination among electric utilities) [hereinafter *C. Phillips*]. Even in the absence of explicit pooling arrangements, the many physical interconnections among American utilities, combined with the tendency of electricity to flow instantaneously along interconnected lines to wherever it is demanded, make it likely that electricity distributed by one utility will be supplied by another. One legal consequence of these interconnections and pooling arrangements is that most electricity flows "interstate," permitting federal, as well as state, regulation of electricity. *See Cincinnati Gas & Elec. Co. v. FPC*, 376 F.2d 506, 507-09 (6th Cir.), *cert. denied*, 389 U.S. 842, 88 S.Ct. 77, 19 L.Ed.2d 106 (1967); *Public Serv. Co. v. FPC*, 375 F.2d 100 (7th Cir.), *cert. denied*, 387 U.S. 931, 87 S.Ct. 2054, 18 L.Ed.2d 992 (1967); *see generally FPC v. Florida Power & Light Co.*, 404 U.S. 453, 92 S.Ct. 637, 30 L.Ed.2d 600 (1972).

Investor-owned utilities of the type we have described supply approximately 75% of the nation's electricity. The remainder is supplied by government- and consumer-owned systems. Unlike their investor-owned counterparts, these systems tend *not* to be integrated. The federal government, for example, generates about 10% of the nation's electricity (at systems such as the Tennessee Valley Authority), but sells most of it to independent distributors. Approximately 2,000 municipalities and cooperatives own small-scale distribution companies, but only a handful generate their own electricity; most purchase the electricity they distribute from investor-owned

utilities or from the federal government. In contrast to investor-owned systems, municipal systems typically enjoy generous tax and financing subsidies and substantial freedom from regulation. *See generally Joskow* at 175-78; Joskow and Schmalensee, *Markets for Power: An Analysis of Electric Utility Deregulation* 17-20 (1983); Lopatka, *The Electric Utility Price Squeeze as an Antitrust Cause of Action*, 31 UCLA L.Rev. 563, 568 & n. 29 (1984) [hereinafter *Lopatka*]; *Meeks*, 72 Colum. L.J. at 67-69.

The record before us reveals facts typical of the national pattern. The defendant, Boston Edison, is a fully integrated investor-owned utility. It belongs to the New England Power Pool ("NEPOOL"). It transmits electricity (either self-generated or, *e.g.*, secured from other NEPOOL members) to 52 cities and towns in eastern Massachusetts. Each of these towns has only one distribution system serving all of the towns' inhabitants. In 39 of the towns, Edison owns the distribution system. In the remaining towns, either the town itself or another utility owns the distribution system. Concord and Wellesley, the plaintiffs, are two of the towns that own their own distribution systems. They take all of their electricity over Edison's transmission lines, and buy most of it directly from Boston Edison.

Edison's rates are completely regulated. The Federal Energy Regulatory Commission ("FERC," or the "Commission") regulates the rates that Edison charges when it sells electricity at "wholesale" (*i.e.*, when it sells electricity to other firms, including municipal distributors, for resale to final customers). *See* 16 U.S.C. § 824 (regulating the "transmission . . . and . . . sale of electric energy at wholesale in interstate commerce"). Before Edison can increase its rates, it must publish the new rates in the Federal Register and give notice of the proposed increase to each of its wholesale customers. *See* 18 C.F.R. § 35.8 (1990). If an interested party raises a

legitimate question about the rate increase, FERC normally will suspend the new rates for up to five months, investigate them, and, if it has not completed its investigation by then, permit them to take effect *subject to refund* in the event it ultimately rejects them. *See* 16 U.S.C. § 824d(d, e). Similarly, the Massachusetts Department of Public Utilities ("DPU") regulates the "retail" rates that Boston Edison charges to consumers in the 39 cities and towns in which it distributes electricity. *See* M.G.L. c. 164, §§ 93-94G. In contrast, as we mentioned earlier, no agency regulates the retail rates that municipal distributors, such as Concord and Wellesley, charge to their customers, for these distributorships are non-profit entities indirectly controlled (through the ballot) by the very customers they serve.

Between 1984 and 1987, Edison filed a series of wholesale rate increases with FERC. Wellesley and Concord vigorously opposed those rate increases before the Commission. In each case, after briefly suspending the rates, the Commission allowed them to take effect subject to refund. The towns sought judicial review of FERC's decisions. Eventually, with one exception not relevant here, *see Towns of Wellesley, Concord and Norwood v. FERC*, 786 F.2d 463 (1st Cir.1986), this court upheld as lawful the relevant FERC determinations, *see Towns of Concord and Wellesley v. FERC*, 844 F.2d 891 (1st Cir. 1988); *Boston Edison Co. v. FERC*, 885 F.2d 962 (1st Cir. 1989).

Concord and Wellesley then attacked the same wholesale rate increases on another legal front. They brought this antitrust action in federal district court. They pointed out that these *wholesale* rate increases filed with FERC were not matched by corresponding *retail* rate increases. Thus, over a three-year period, Edison's rates to Concord and Wellesley increased while its rates to its own retail customers in the 39 towns surrounding Con-

cord and Wellesley stayed roughly the same. The effect of this disparity, said Concord and Wellesley, was to put the two towns in a price squeeze. If they did not raise their own retail rates to reflect the higher cost of buying electricity from Edison, they would make less money; but if they raised their retail rates while Edison's stayed the same, customers for whom they and Edison compete (say, a small manufacturer with high energy costs) might decide to forego Concord and Wellesley and settle in a town served by Edison. In light of the resulting potential harm to their electricity distributing businesses, Concord and Wellesley argued that the wholesale price increases, in the absence of corresponding retail price increases, amounted to unlawful monopolization. *See* Sherman Act § 2, 15 U.S.C. § 2(a). A jury agreed, and the district court declined to overturn its verdict. *See Town of Concord v. Boston Edison Co.*, 721 F.Supp. 1456 (D.Mass. 1989). We disagree with the district court, and we reverse the judgment.

II

The Price Squeeze

The basic legal principles that govern this monopolization case are well settled. Even though Boston Edison is a regulated firm, it has no blanket immunity from the antitrust laws. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-75, 93 S.Ct. 1022, 1027-28, 35 L.Ed.2d 359 (1973); *see also Cantor v. Detroit Edison*, 428 U.S. 579, 596 n. 35, 96 S.Ct. 3110, 3120 n. 35, 49 L.Ed.2d 1141 (1976); *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59, 93 S.Ct. 1870, 1877-78, 36 L.Ed. 2d 635 (1973). The antitrust law relevant in this case makes it unlawful for a firm to "monopolize . . . any part of the trade or commerce among the several States." Sherman Act, § 2, 15 U.S.C. § 2(a). To prove a violation of this statute, a plaintiff must demonstrate (1) that the defendant possesses "monopoly power in the relevant

market," and (2) that the defendant has acquired or maintained that power by improper means. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983). Like many courts and commentators, we refer to improper methods of acquiring or maintaining monopoly power as "exclusionary conduct." Borrowing from Professors Areeda and Turner, we have defined "exclusionary conduct" as " 'conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.' " *Barry Wright*, 724 F.2d at 230 (quoting 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 626, at 83 (1978) [hereinafter *Areeda & Turner*]).

We shall assume for now that Edison has monopoly power in a relevant market and begin by examining whether Edison's pricing practices amount to exclusionary conduct. Traditional antitrust principles will guide our analysis. We shall compare the challenged practice's likely anticompetitive effects with its potentially legitimate business justifications. *See Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed. 2d 780 (1989); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 10 (1st Cir.1987); *Meeks*, 72 Colum. L.J. at 80. In doing so, we shall bear in mind that a practice is not "anticompetitive" simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors. Rather, a practice is "anticompetitive" only if it harms the competitive process. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89, 97 S.Ct. 690, 697-98, 50 L.Ed.2d 701 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962); *Clamp-All*, 851 F.2d at 486.

It harms that process when it obstructs the achievement of competition's basic goals—lower prices, better products, and more efficient production methods. *See, e.g., Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 794 (1st Cir.1988); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 228-29 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987); *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 379 (7th Cir. 1986), *on denial of r'hrg*, 802 F.2d 217, *cert. denied*, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987); *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 315 (8th Cir.1986); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005, 108 S.Ct. 1728, 100 L.Ed.2d 192 (1988); *see also Reiter v. Sonotone*, 442 U.S. 330, 343, 99 S.Ct. 2326, 2333, 60 L.Ed.2d 931 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.' ") (quoting R. Bork, *The Antitrust Paradox* 66 (1978)); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 500-01, 60 S.Ct. 982, 996-97, 84 L.Ed.2d 1311 (1940) ("Restraints on competition" do not constitute antitrust violations unless they "have or [are] intended to have an effect upon prices in the market or otherwise . . . deprive purchasers or consumers of the advantages which they derive from free competition").

Finally, we shall take account of the institutional fact that antitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. They must be administratively workable and therefore cannot always take account of every complex economic circumstance or qualification. *See Barry Wright*, 724 F.2d at 234. (Indeed, the need for clarity and administrability sometimes leads to *per se* rules that prohibit inquiry into the actual harms and benefits of challenged conduct. *See Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545

(1958).) They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings.

These last-mentioned administrative considerations are particularly important when courts apply antitrust law to a regulated industry. That is because "regulation" and "antitrust" typically aim at similar goals—*i.e.*, low and economically efficient prices, innovation, and efficient production methods—but they seek to achieve these goals in very different ways. Economic regulators seek to achieve them *directly* by controlling prices through rules and regulations; antitrust seeks to achieve them *indirectly* by promoting and preserving a process that tends to bring them about. An antitrust rule that seeks to promote competition but nonetheless interferes with regulatory controls could undercut the very objectives the antitrust laws are designed to serve. Thus, where regulatory and antitrust regimes coexist, *see, e.g., Otter Tail*, 410 U.S. at 372, 93 S.Ct. at 1027 (electric industry); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 352, 83 S.Ct. 1715, 1735, 10 L.Ed.2d 915 (1963) (bank mergers), antitrust analysis must sensitively "recognize and reflect the distinctive economic and legal setting" of the regulated industry to which it applies. Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 Antitrust Bull. 559, 565 (1977) [hereinafter *Watson & Brunner*]; *see generally Meeks, supra.*

For reasons we shall now set out, these principles lead us to conclude that a price squeeze of the sort at issue here does not ordinarily violate Sherman Act § 2 where the defendant's prices are regulated at both the primary and secondary levels. In so holding, we *are not* saying either that the antitrust laws do not apply in this regulatory context, or that they somehow apply less stringently here than elsewhere. Rather, we are saying that, in light

of regulatory rules, constraints, and practices, the price squeeze at issue here is not ordinarily exclusionary, and, for that reason, it does not violate the Sherman Act. *Cf.* 1 *Areeda & Turner* ¶ 223d, at 140 (noting that "antitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation"); *Watson & Brunner*, 22 Antitrust Bull. at 560 (warning that "the dogmatic transposition of monopolization concepts from conventional market settings to regulated industries" may produce results inimical to the goals of antitrust). We reach this conclusion by (1) analyzing the ordinary price squeeze, (2) comparing it to the "regulatory" price squeeze, and (3) noting that regulation makes a critical difference in terms of antitrust harms, benefits, and administrative considerations.

A. Price Squeeze Liability in an Unregulated Industry

To explain our conclusion, we must first discuss the ordinary price squeeze case, the case of an unregulated monopolist whose prices (at, say, the wholesale and retail levels) leave inadequate room for an independent competitor (at, say, the retail level) to survive. Only if the reader understands the major antitrust harms, benefits, and administrative considerations in that ordinary case, and sees how they are rather evenly balanced, will he understand why price regulation tips that balance so significantly towards legality. *Cf.* 3 *Areeda & Turner* ¶ 729c, at 235-38 (arguing that *Alcoa* overstated the harms, understated the benefits, and disregarded significant administrative burdens associated with the ordinary price squeeze).

The antitrust argument against the price squeeze typically begins by observing that a "one-level" monopolist engaged in a prolonged price squeeze may drive independent competitors out of business and thereby extend its monopoly power to a second industry level. This

fact alone, however, does not mean that a price squeeze is anticompetitive. Merely eliminating competitors is not necessarily anticompetitive, for, as we explained earlier, even legitimate business activity that succeeds in helping a firm will likely disadvantage the firm's competitors. *See* pp. 21-22, *supra*, and cases cited. Moreover, the extension of monopoly power from one to two levels does not *necessarily*, nor in an *obvious* way, give a firm added power to raise prices. As several members of the Supreme Court have pointed out, a "widely accepted" (albeit "counterintuitive") economic argument supports the conclusion of many commentators that "there is but one maximum monopoly profit to be gained from the sale of an end-product," 3 *Areeda & Turner* ¶ 725b at 199. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 36, 104 S.Ct. 1551, 1570, 80 L.Ed.2d 2 (O'Connor, J., concurring in the judgment); *see also* R. Bork, *The Antitrust Paradox* 229 (1978) ("[V]ertically related monopolies can take one monopoly profit") [hereinafter *R. Bork*]; R. Posner & F. Easterbrook, *Antitrust* 870 (2d ed. 1989) ("There is only one monopoly profit to be made in a chain of production."). (For an intuitive explanation of this "counterintuitive" argument, see Appendix A to this opinion.) What difference does it make, one might ask, whether the monopolist obtains this "maximum monopoly profit" by controlling two industry levels or just one?

At least two arguments have been made in answer to this question. The first is that a monopolist who extends his monopoly to a second industry level raises "entry barriers," thereby fortifying his monopoly position. Assume, for example, that Alcoa has monopolized only ingot production and has raised its prices somewhat above the competitive level. Alcoa's monopoly position in ingot will no doubt deter some new firms from entering ingot production, but it might also attract some new firms hoping to obtain a share of Alcoa's supercompetitive profits. Now assume Alcoa extends its monopoly to sheet produc-

tion as well, the industry level, say, that consumes most of Alcoa's ingot. New firms might now be more reluctant to enter *ingot* production, fearing that Alcoa, in its capacity as "sheet fabricator-monopolist," would refuse to buy ingot from the new ingot producer, or that it would drop its own ingot prices and take the industry's entire "single monopoly profit" from the sale of sheet. The new firm might conclude that the only prudent way to challenge Alcoa would be to enter the industry at *both* levels at once. Insofar as it is more difficult for a firm to enter an industry at two levels than at one, the monopolist, by expanding its monopoly power, has made entry by new firms more difficult. And insofar as the monopolist previously set prices cautiously to avoid attracting a competitive challenge, the added security of a two-level monopoly could even lead that monopolist to raise its prices. *See* 3 *Areeda & Turner* ¶ 725h, at 204-08; *see also id.* ¶ 1011, at 243-54; Shepherd, *Potential Competition Versus Actual Competition*, 42 Admin.L.Rev. 5-34 (1990).

The second argument against permitting extension of monopoly power concerns "non-price" competition. The existence of competitors at a second "level", irrespective of their effects upon price, provides an added incentive for the monopolist to develop better products and better, more efficient ways to produce the product. *See* 2 *Areeda & Turner* ¶¶ 402b2-402b3, at 269-70; *id.* ¶ 403c, at 272 & n. 3; 3 *Areeda & Turner* ¶ 725g, at 204. Indeed, a "second-level" independent firm that develops better products or more efficient production methods may thereby obtain the strength needed to challenge the monopolist at the "primary level."

We recognize that there are other arguments one might make about the possible anticompetitive effects of a price squeeze. *see generally* 3 *Turner & Areeda* ¶¶ 725e-725f, at 201-04 (reviewing other arguments); and we realize, as well, that scholars dispute the practical significance of the two arguments just made. *Compare* 3 *Areeda &*

Turner ¶¶ 725g-725h, at 204-08 *with R. Bork* at 240-43. Nonetheless, we believe that other arguments (such as those related to economic price discrimination) tend to be inconclusive in respect to anti-competitive effects. *See* 3 *Areeda & Turner* ¶¶ 725e-725f, at 201-04; *R. Bork* at 241-42. We therefore believe that the two arguments just given are the most important of those that favor prohibiting a price squeeze; and we are willing to assume they would justify such a prohibition were there nothing to be said in favor of permitting prices that could create such a squeeze.

There are, however, at least two traditional circumstances in which prices that create a squeeze might simultaneously bring about economic benefits. First, the primary-level monopolist might carry out its second-level activities more efficiently than its independent competitors. If so, prices that squeeze the less efficient second-level competitors, even to the point of forcing them from the business, could (by lowering costs) lower prices, or, in any event, save economic resources. *See* 3 *Areeda & Turner* ¶ 725d, at 201 ("Whenever vertical integration produces new efficiencies, some of the cost savings . . . [will] be translated into a price reduction and . . . [will] save productive resources."); *R. Bork* at 243.

Second, prices that squeeze a "second-level" firm will benefit consumers whenever the "second-level" firm *is itself* a monopolist. *See Fishman v. Estate of Wirtz*, 807 F.2d 520, 563 (Easterbrook, J., dissenting) ("That successive monopolies injure consumers is a proposition on which there is unanimous agreement") (collecting authority). If, for example, ingot costs $40, the fabricating process costs $35, and the profit-maximizing price for sheet is $100, an ingot monopolist will charge $65 for the ingot, hoping that competition at the fabricating level will keep the total price at $100. If a different, independent monopolist dominates the fabricating level, however, that independent monopolist buying ingot at $65 will mark

up the price by more than $35, because he wants to earn monopoly profits as well. The result will be a market price of more than $100, resulting in smaller monopoly profits overall (for the final price is too high), but greater profits for the second monopolist than if he sold sheet for only $100. (Appendix B to this opinion contains a numerical example that may help the interested reader understand intuitively why this is so.) Under these circumstances, entry by the ingot monopolist into the sheet-fabrication level—even by means of a price squeeze—will help the consumer by limiting the final price of sheet to $100. *Cf. Atlantic Richfield Co. v. USA Petroleum Co.*, —— U.S. ——, 110 S.Ct. 1884, 1891, 109 L.Ed.2d 333 (1990) ("When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an 'anticompetitive' consequence of the claimed violation." (footnote omitted)); *see generally* 3 *Areeda & Turner* ¶ 725c, at 200-01.

Again, the price squeeze may have additional benefits, *see generally* 3 *Turner & Areeda* ¶¶ 725e-725f, at 201-04, and one can debate the empirical significance of those we have mentioned. But we believe that the two examples we have given show that prices that create a squeeze can, at least sometimes, have important beneficial effects.

Finally, we note that it is not easy for courts to administer Judge Hand's price squeeze test. That test makes it unlawful for a monopolist to charge more than a "fair price" for the primary product while simultaneously charging so little for the secondary product that its second-level competitors cannot make a "living profit." *See Alcoa*, 148 F.2d at 437-38. But how is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and de-

mands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price "gap?" Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And how should the court respond when costs or demands change over time, as they inevitably will?

We do not say that these questions are unanswerable, but we have said enough to show why antitrust courts normally avoid direct price administration, relying on rules and remedies (such as structural remedies, *e.g.*, prohibiting certain vertical mergers) that are easier to administer. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 397, 47 S.Ct. 377, 379, 71 L.Ed. 700 (1927) (observing that "[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow"); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898) (Taft, J.) (stating that to inquire into the reasonableness of prices is to "set sail on a sea of doubt"), *aff'd*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899); 3 *Areeda & Turner* ¶ 701, at 148-50 ("The courts correctly regard as uncongenial and foreign to the Sherman Act the burden of continuously supervising economic performance.").

To reach *Alcoa*'s conclusion that the price squeeze is exclusionary, one must believe that the anticompetitive risks associated with a price squeeze outweigh the possible benefits and the adverse administrative considerations. We do not question that conclusion here, but we qualify it by noting that the harms and benefits (including the more doubtful ones we have glossed over, *see generally* 3 *Areeda & Turner* ¶¶ 725e-725f, at 201-04), are closely balanced. In light of this close balance, we should not blindly and automatically apply *Alcoa's* price squeeze rules in the presence of significantly different economic circumstances such as full economic regulation.

B. Price Squeeze Liability in a Regulated Industry

Full price regulation dramatically alters the calculus of antitrust harms and benefits. First, regulation significantly diminishes the likelihood of major antitrust harm. In particular, it diminishes the likelihood of "entry barrier" harm, namely the risk that (1) prices will rise because (2) new firms will hesitate to enter a market and compete after (3) a squeeze has driven pre-existing independent competitors from the marketplace. All three propositions are made doubtful by regulation. For one thing, in a regulated industry, regulators control prices directly. Statutes typically require regulators to maintain prices at "reasonable" levels. *See, e.g.*, 16 U.S.C. §§ 824d(a), 824e(a) (an electric utility's rates must be "just and reasonable"); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281, 288, 88 L.Ed. 333 (1944) (A "reasonable" rate is one that permits the firm to recover its costs and earn a reasonable profit); *see generally* J. Bonbright, A. Danielsen & D. Kamerschen, *Principles of Public Utility Rates* (2d ed. 1988) (describing ratemaking principles) [hereinafter *J. Bonbright*].

For another thing, factors related to regulation, such as the economic ability of a market to support new entry, or the legal requirement that a firm secure permission to enter, are likelier to determine new entry into a regulated industry than is a new entrant's fear of a two-level monopolist's enhanced retaliatory power. After all, should the regulator decide that new entry is warranted, it typically has the legal authority to prevent an existing "two-level" monopolist from improperly disadvantaging a new "second-level" competitor by, say, refusing to deal to with it or by charging unreasonably high prices. *See, e.g.*, 16 U.S.C. §§ 824f, 824i-824k (authorizing FERC to order interconnections, sales and wheeling of electricity among utilities); *see also* 2 A. Kahn, *The Economics of Regulation* 113-172 (discussing the concept of "natural

monopoly") [hereinafter *A. Kahn*]; *Meeks*, 72 Colum. L.Rev. at 95 & n.135 (noting that utilities in "all but a handful of states . . . must obtain a certificate of public convenience and necessity to serve an area" with electricity) (collecting statutes).

Finally, regulation in the electricity industry makes it less likely that a price squeeze will actually drive independent distributors from the marketplace. Local electricity distribution, after all, is itself considered a "natural monopoly" with service typically provided by a single franchised company to relatively immobile customers. *See Joskow* at 178; *cf. Otter Tail*, 410 U.S. at 369, 93 S.Ct. at 1025. Higher wholesale electricity prices (or lower retail prices elsewhere) will not lead the entire towns of Wellesley and Concord to pull up stakes and move to Dover. And the record lacks convincing evidence that competition between Edison and the plaintiff towns for customers living on the towns' borders, or for mobile high-energy-consuming industrial customers, is sufficiently important to threaten the plaintiffs with bankruptcy should such users switch to Edison. *Cf. Joskow* at 209-13 (arguing that, as a rule, there is little actual competition between electricity distributors). Even if an integrated utility such as Edison managed to set prices that severely squeezed a distributor, it could not take over the municipality's distribution area without the regulator's permission. *See, e.g.*, M.G.L. ch. 164 § 68 (Massachusetts municipality may not sell its distributorship without regulatory approval).

Second, regulators try to set prices that reflect costs. To the extent that they succeed, an integrated utility's prices are likely to squeeze independent distributors who buy from it at wholesale only if those distributors operate less efficiently, *i.e.*, at higher cost. Consequently, a rule preventing prices that create a squeeze will more likely discourage efficient operations and deprive consumers of prices that reflect lower costs.

Third, for institutional reasons, an antitrust rule making the price squeeze illegal threatens consumers. The plaintiffs say that Edison violated the antitrust laws by *asking* for rates (*i.e.*, *filing* rate proposals) that would produce for Edison a "higher return" on its "wholesale sales than. . . . on its retail sales." *See* Appellee's Brief at 4-8, 35-36. Other courts considering price squeeze claims have also emphasized that the alleged antitrust violation consisted of proposing or requesting rates that would narrow the gap between wholesale and retail rates so as to squeeze existing retail competitors. *See, e.g., City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1179 (8th Cir.1981) ("[T]he question" in a price squeeze case is "whether the defendant utility acted illegally *in proposing* a certain anticompetitive combination of rates") (emphasis added), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 814, 74 L.Ed.2d 1013 (1983); *City of Newark v. Delmarva Power & Light Co.*, 467 F.Supp. 763, 768 (D.Del. 1979) (chief allegation in price squeeze case was that defendant "used its power to *initiate* rates . . . to attempt to obtain an anticompetitive rate structure") (emphasis in original). A rule that penalizes the filing of wholesale rate increases would not necessarily lead firms to abandon wholesale rate increases; it could, instead, simply lead them to seek a retail rate increase whenever they seek a wholesale rate increase. (Conversely, it would discourage a utility from conceding that a retail price cut is reasonable unless it is also prepared to concede that a wholesale price cut is reasonable.) In this case, for example, the rule might have permitted Edison to escape liability by filing (or perhaps obtaining) a rate increase in the 39 cities and towns where it distributes electricity itself. Indeed, the rule would encourage Edison to seek a retail rate increase so high that a jury could not find the wholesale/retail gap too narrow. Such a rule of law (which could lead to unnecessary regulatory proceedings and unnecessary rate increases) would seem to w rk at cross-purposes with basic antitrust objectives. *Cf. Matsushita*

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S.Ct. 1348, 1360, 89 L.Ed.2d 538 (1986) (warning courts against adopting rules or practices that "chill the very conduct the antitrust laws are designed to protect"); *Barry Wright*, 724 F.2d at 234 ("[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.").

Fourth, an anti-price-squeeze rule, particularly the "equal profit earned at both levels" rule that plaintiffs advocate, presents special administrative difficulties in the regulatory context. For one thing, the Constitution guarantees a regulated firm a reasonable return on its investment, *see Hope Natural Gas Co., supra; Bluefield Water Works v. Public Serv. Comm'n*, 262 U.S. 679, 690, 43 S.Ct. 675, 678, 67 L.Ed. 1176 (1923); *see also* 16 U.S.C. §§ 824d(a), 824e(a) (rates must be "just and reasonable"). May courts prevent a utility from asking the regulator for a rate increase should the utility believe that current wholesale returns are, constitutionally speaking, too low? Similarly, what if the utility believes that different risks at different levels of the industry call for somewhat different rates of return?

For another thing, how will juries decide the amount of the firm's investment on which the "rate of return" is calculated? Profit, after all, is a return on a certain amount of investment. Much electricity investment is used to serve *both* wholesale and retail services. Accounting systems for allocating investment between different services or customer classes are notoriously complicated and sometimes arbitrary. *See J. Bonbright* at 495 (noting that dozens of schemes exist for allocation investment among customer classes) (collecting sources); *Joskow* at 180 ("Despite the legal distinction between 'retail sales' . . . and 'wholesale sales,' . . . essentially there is no functional distinction between generation and transmission facilities dedicated to retail and wholesale transactions.").

Will juries be permitted to "second guess" the regulator's allocation rules or its specific investment allocation decisions? Is the jury (as may, in a sense, have occurred here) to be permitted to decide that the utility's allocation (following Commission allocation procedures) of, say, $100 million investment to distribution and $400 million to wholesale, should have been $200 million/$300 million instead (in which case, of course, the pre-existing 10% profit earned at each level would look like 5% earned at retail and 13% at wholesale). What antitrust benefit would be gained by permitting juries to speculate in this way? Would not the results likely be arbitrary? For that matter, what antitrust benefit would be gained by a rule that freezes prices at levels designed to produce "equal profit rates" using some historically based commission-approved system for allocating investment? Any such court involvement in the rate-setting process could easily discourage utilities from proposing, and commissions from considering, such innovative, economically based, energy-conserving pricing systems as off-peak pricing (charging higher prices for electricity used during peak periods), incremental-cost pricing (charging prices for certain services reflecting the higher costs of hypothetical new construction), or even traditional Ramsay pricing (tailoring rates to reflect the comparative likelihood that higher rates will force customers to discontinue service); for there is no particular reason to believe that such rates would (or would not) reflect "equal" profits according to some particular prior, historical, commission-approved system for allocating investment. *See generally* 1 *A. Kahn* 87-103. At best, permitting judges and juries to speculate in this area would force regulators continually to revisit prior investment-allocation rules and would discourage regulatory efforts to develop (often with a utility's help) a set of economically rational pricing practices—which, after all, is a common objective of antitrust law and regulation.

Fifth and finally, a distributor who disagrees with the utility's, or the commission's, cost-allocation methods or with its rates, or who believes that a price squeeze will harm it (whether or not the price squeeze also harms the competitive process), has an administrative remedy. It can challenge a utility's rates and practices before the Commission as unjust, unreasonable, or "discriminatory." *See* 16 U.S.C. §§ 824d(a, b), 824e(a); 18 C.F.R. § 2.17 (a) (1990). As part of its challenge, it can ask the Commission to consider the alleged price squeeze harm. *See FPC v. Conway*, 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed.2d 626 (1976). If FERC permits the rates to take effect after suspension and later determines that a price squeeze exists, it can order an appropriate refund.

In sum, the relevant antitrust considerations differ significantly, in degree and in kind, when a price squeeze occurs in a fully regulated as opposed to an unregulated industry. Indeed, these considerations, which are closely balanced in the ordinary price squeeze, change so significantly when the squeeze takes place in a fully regulated industry that, in our opinion, the legal consequences of the squeeze change as well. That is to say, a price squeeze in a fully regulated industry such as electricity will not normally constitute "exclusionary conduct" under Sherman Act § 2.

We are aware that reported opinions in three circuit courts of appeal and several district courts suggest that a price squeeze may be unlawful in the regulated electricity industry. *See City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173 (8th Cir.1982), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 814, 74 L.Ed.2d 1013 (1983); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir.1981); *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976 (7th Cir.1980) (*Mishawaka II*), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 892, 66 L.Ed.2d 824 (1981); *see also City of Newark v. Delmarva Power & Light Co.*, 467 F.Supp. 763 (D.Del.1979); *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F.Supp.

1343 (W.D.Pa.1979), *later proceeding*, 570 F.Supp. 553 (1983); *City of Batavia v. Commonwealth Edison Co.*, No. 76-C-4388, slip op. (N.D.Ill. Jan. 16, 1984). In only one of those cases, however, did the court actually enter, or affirm, a judgment against the defendant; thus, there is extremely little case law *holding* that a public utility price squeeze is exclusionary. Moreover, in all of the cases we have cited, the price squeeze allegation was but one of several allegations of several different kinds of "exclusionary conduct," and the one court that affirmed a Sherman Act § 2 judgment against a utility stressed that it might well *not* have done so had the price squeeze stood alone (as it does in the case before us). *See Mishawaka II*, 616 F.2d at 986 (suggesting that "no one aspect [of the defendant's conduct] standing alone is illegal"). Further, in every case, the price squeeze allegation involved wholesale prices that *exceeded* retail prices, (a matter here in doubt), thereby eliminating some of the "administrative" problems we have found surrounding a jury's efforts to determine the reasonableness of the price "gap." *See City of Mishawaka I v. Indiana & Michigan Electric Company*, 560 F.2d 1314, 1316 (7th Cir.1977) (wholesale price to municipalities "substantially higher" than retail price to industrial customers, threatening municipalities with "financial extinction"); *City of Kirkwood*, 671 F.2d at 1176; *City of Groton*, 662 F.2d at 925; *City of Newark*, 467 F.Supp. at 766; *Borough of Ellwood City*, 570 F.Supp. at 557; *City of Batavia*, *supra*. Thus, technically speaking, our holding is consistent with these other cases. Indeed, since we cannot find significant evidence that Edison's price squeeze deprived plaintiffs of a "living profit" (for the plaintiffs earned substantial returns, and even increased their sales, during the price squeeze period), our holding is arguably a consistent application of the rule set forth in *Alcoa* itself.

Nevertheless, we recognize that our reasoning and analysis differs significantly from that in the opinions

(other than *Alcoa*) just cited. We have carefully considered these differences and have found nothing to convince us that our analysis is incorrect. Even so, we have limited our holding by stating that "normally" a price squeeze will not constitute an exclusionary practice in the context of a fully regulated monopoly, thereby leaving cases involving exceptional circumstances for another day. And we have stressed that our reasoning applies with full force only when the monopolist who engages in the squeeze is regulated at both industry levels. We recognize that a special problem is posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that regulation forbids at the first. *See* 3 *Areeda & Turner* ¶ 726e, at 217-20.

III

Monopoly Power

A second, legally fatal problem with plaintiffs' case is that they failed to show that Boston Edison possessed monopoly power in the relevant market. As we have repeatedly pointed out, the traditional, *Alcoa*-type price squeeze occurs when a monopolist uses its control over the *monopolized* product (*e.g.*, ingot) to obtain a monopoly at a second industry level (*e.g.*, sheet). In this case, it is undisputed that Boston Edison has a (lawful) monopoly at one level of the electricity industry, namely transmission, for a given area normally can support only one transmission system, *see, e.g., Meeks*, 72 Colum.L. Rev. at 87, and Edison owns the transmission grid covering the area that includes Concord and Wellesley. The plaintiffs, however, cannot show (indeed, with one exception, they do not try to show) that Boston Edison used its control of electricity *transmission* to their disadvantage. To the contrary, the record clearly demonstrates that Boston Edison will "wheel" (*i.e.*, transmit) electricity from other producers to any distributor upon re-

quest, all for a nominal transmission charge that no one claims is unreasonably high. *See* Record Appendix at 1442, 1451-52, 1704-05 [hereinafter *App.*]. Indeed, Concord and Wellesley buy some of their electricity from the New York Power Authority, which wheels that electricity over Edison's lines, and at least half a dozen municipal distributorships use Edison's lines to obtain *all* of their electric power from non-Edison sources. *See App.* at 1449-50. Concord is a member of NEPOOL, all of whose members have interconnected lines, used to transfer electricity freely among them; and the record suggests that Wellesley is free to join NEPOOL should it wish to do so. The only arguably contrary evidence in the record consists of Concord's claim that Boston Edison refused to connect it to a 115 kv line; but the record does not (1) suggest that Concord needs that connection to buy electricity elsewhere, (2) indicate that the dispute concerns anything other than the connection price, or (3) show that the demanded connection price was unreasonably high.

At the same time, the record fails to show that Edison had monopoly power at the *generation* level, the industry level at which plaintiffs claim Edison charged too high a rate. To the contrary, the record shows that more than a dozen different power generating companies sell wholesale power in New England and that this power flowed freely among NEPOOL members. It shows that municipalities near Concord and Wellesley, municipalities to the north, south, east, and west of Concord and Wellesley, bought their electricity from production companies other than Boston Edison. It shows that Boston Edison's electricity production accounted for less than 12% of the electricity produced by these New England utilities. These facts and figures suggest that Boston Edison is far from attaining the 70% to 90% of the sales in a well-defined marketplace that Judge Hand (and later commentators) thought indicative of monopoly power. *See, e.g., Alcoa,* 148 F.2d at 424 (stating that a 90% market

share "is enough to constitute a monopoly" but that 60% is probably, and 30% is "certainly," not enough); *City of Mount Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 279-80 (8th Cir. 1988) (electricity suppliers accessible via wheeling must be included in wholesale market); *Lopatka*, 31 U.C.L.A.L. Rev. at 611 (arguing that the geographic market for wholesale electricity "include[s] all generation sources from which the municipality could obtain power at relatively insubstantial wheeling costs").

In their efforts to show monopoly power at the generation level, the towns point to three pieces of evidence. First, they say that Concord had a study made "which concluded that it was not economically feasible for the Town . . . to obtain its power requirements from non-Edison sources. . . ." The study in question, however, says that "the reason" the town will have lower power costs in the long run by buying from Edison is that Edison's "rate is based on embedded resources which are lower priced than the new units with which" the town would have to "meet its power supply requirements" if it stopped buying from Edison. This "reason" does not show that Edison has monopoly power. It shows only that Edison can charge lower prices because it bought its generating equipment at older, cheaper prices, (rather like a wheat farmer who, having purchased unusually fertile land long ago, could now sell wheat at lower prices or earn higher profits than other farmers, even in a highly competitive wheat market). In a competitive market a firm that bought older, cheaper generating equipment would simply charge the higher prices that the cost of new, expensive equipment requires its competitors to charge and it would pocket the difference. In a regulated market, the regulator forces the "historically lucky" firm to pass along some, or all, of this potential extra profit to its customers in the form of lower prices. In either case, the "extra" profit resulting from lower costs is not a monopoly profit. It is called an "economic rent." And its presence is consistent with a perfectly competi-

tive marketplace. *See* 2 *Areeda & Turner* ¶ 510, at 33-34; P.A. Samuelson, *Microeconomics*, at 213-214, 635 (13th ed. 1989); G. Stigler, *The Theory of Price*, at 258-63 (4th ed.1987). Concord's study, which relates Edison's superior performance to cost advantages, is not evidence that Edison has market power.

Second, plaintiffs point to a provision in Edison's tariff that states that, if they wish to buy power from other firms, they must either (1) give Edison five years advance notice, or (2) compensate Edison for any adverse impact Edison suffers in the subsequent three years. We need not explain all the reasons why this provision does not show that Edison possesses monopoly power, however, because, at a minimum, the record does not show that the tariff either unreasonably, or significantly, limits a customer's ability to buy from others. To the contrary, the plaintiffs have bought power from non-Edison sources, namely the New York Power Authority, despite the provision. And the plaintiffs remain free to challenge before FERC any unreasonably high charge that Edison might try to assess under this provision.

Third, the plaintiffs argue that the kind of electricity supply service they need—a firm commitment by a generating source to supply their full requirements—was simply unavailable from any firm other than Edison; hence, Edison had "monopoly power" over the price of this particular kind of service. Plaintiffs offered three pieces of evidence to support this contention: (1) John O'Neil, superintendent of the Concord light plant, in response to the question, "Was there any other firm requirements power available for Concord to purchase from utilities other than Boston Edison?," answered, "Not to my knowledge, no, sir." (2) Maurice Berdan manager of the Wellesley light plant, in response to the question, "Is there any other source of firm requirements wholesale power available to the Town of Wellesley other than Boston Edison Company?", answered (over an objection

that the answer "appears to call for an expert opinion and/or for hearsay"), "We had consultants look at it, and I have also had discussions with other people in the industry that we have not found any other sources of power, firm requirements power, that would be available . . ." and it was "public knowledge in the industry that firm requirements power is not available." (3) The minutes of the March 10, 1987 Concord Municipal Light Board meeting report,

> A question was raised as to whether or not Concord could become a customer of New England Power. It was stated that the 'NEES Plan' does not include new large power loads; Princeton's request to return to all-requirements status was rejected.

We do not think this evidence sufficient to show that Edison possessed "monopoly power" with respect to "firm requirements" contracts to supply electricity. For one thing, we do not see how a reasonable juror could conclude from this testimony and minutes that no firm other than Edison would sell "firm requirements" electricity at a price that roughly reflected current production costs. After all, the record is filled with evidence that other municipal distributors bought electricity from other suppliers. Both town witnesses were testifying in the context of a report (discussed at p. 30, above) that said it was less *economical* for the towns to buy electricity elsewhere than from a utility that had especially low historical costs. Neither town witness had himself tried to obtain a "firm requirements" contract for electricity (indeed, Mr. O'Neill conceded that he had "never talked to another utility besides Boston Edison on behalf of Concord"). And neither town witness made clear either the specific basis for his conclusion, nor, for that matter, did either witness say that he meant it was *not possible* to find an alternative supplier at prices reasonably close to current costs of production. To the contrary, David Foote, an Edison witness, who worked for a group of

New Hampshire utilities, stated that he had contacted three New England utilities (other than Edison) during the period in question and found that one of them would enter into a "firm requirements" contract to supply electricity.

For another thing, as we explained above, a simple showing that Edison offered a "firm requirements" contract (or any other type of contract) for power *more cheaply* than alternative suppliers does *not* show that Edison had monopoly power. Monopoly power is the power to raise price well above competitive levels before customers will turn elsewhere. *See generally* 2 *Areeda & Turner* ¶¶ 501-506, at 322-29. The plaintiffs' evidence shows neither that Edison's rates were significantly lower than the rates of others, nor that any such lower rates reflected anything other than lower costs; and the latter, as we explained earlier, is evidence only of an economic rent, not of monopoly power. *See* p. 30, *supra*. In the face of these economic facts, and other evidence in the record, the three pieces of evidence cited are simply too skimpy to support a "monopoly power" conclusion.

Finally, even though classical price regulation rests upon the premise that the regulated firm maintains a "natural monopoly," we resist any temptation to permit a jury to infer monopoly power from the mere fact of wholesale rate regulation itself. Whatever the historical basis for such regulation, today there is a growing conviction among students of the subject that the electricity generation business (as opposed to the transmission and distribution business) may be able to support several competing firms. *See, e.g.*, P. Joskow, *Regulatory Failure, Regulatory Reform and Structural Change in the Electric Power Industry* in *Brookings Papers: Microeconomics 1989* at 189-90 (1989); R. Pierce, *A Proposal to Deregulate the Market for Bulk Power*, 72 Va.L.Rev. 1183, 1212-15 (1986).

For these reasons, we do not believe plaintiffs met their burden of providing evidence from which a jury

could find that Edison had significant monopoly power in the relevant market, *i.e.*, the power to raise price significantly higher than the cost-based level that competition would otherwise bring about.

The judgment of the district court is

Reversed.

APPENDIX A

We offer the following highly simplified intuitive explanation of the "single monopoly profit" argument, based upon an example given by Professors Areeda and Turner.

> Assume that copper is used only to produce pipe. Assume that the industry has two "levels:" (1) refining ore into copper ingot and (2) fabricating ingot into pipe. Assume the profit-maximizing price for copper pipe is $100. (Charging more would reduce pipe sales to the point where the monopolist would earn less profit; charging less would increase pipe sales, but not enough to make up for lost potential revenue on each sale.) Assume the cost (including a reasonable profit) of refining ore into ingot is $40. Assume the cost of fabricating ingot into pipe is $35.
>
> Suppose that the "ingot" stage of the industry is monopolized but the "pipe" stage is competitive. An ingot monopolist would charge $65 for its ingot; it would rely upon competition among pipe fabricators to keep the mark-up at $35 and the fabricated-pipe price at $100; and it would pocket $25 ($65 minus $40) of monopoly profit.
>
> Suppose, instead, that the "ingot" stage of the industry is competitive but the "pipe" stage is monopolized. Competition at the "ingot" stage would produce an ingot price of $40. The pipe monopolist would buy the ingot for $40; it would sell the fabricated pipe for $100; and (after subtracting the $40

cost of ingot and $35 cost of fabrication) it would pocket $25 of monopoly profit.

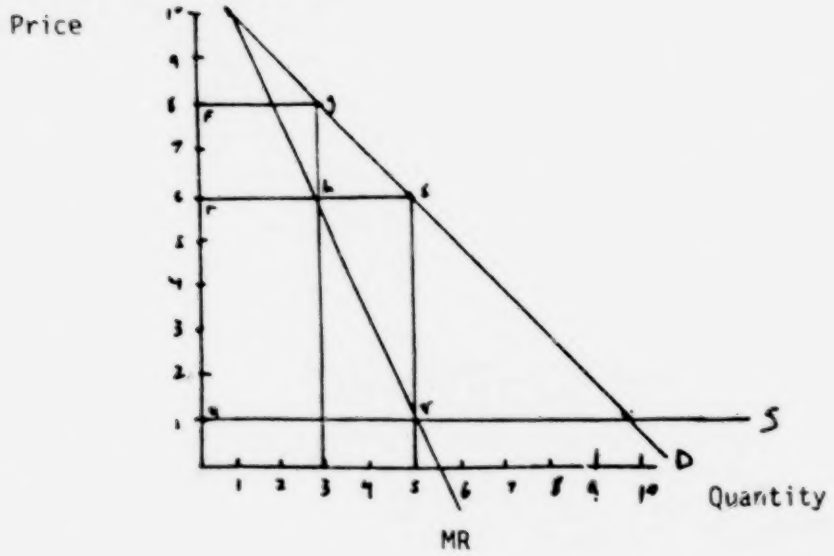
Now suppose a single, integrated firm managed to achieve a monopoly at *both* "levels" of the industry. It would sell pipe at the profit-maximizing price of $100. After deducting its total costs ($40 plus $35), it would pocket $25 of monopoly profit.

In each case, the profit-maximizing price remains $100 and the monopoly profit is $25. This normally will remain so as long as the manufacturing costs associated with ingot and pipe remain the same.

See 3 *Areeda & Turner* ¶ 728b, at 199.

APPENDIX B

This is a graphic and a numerical example offered to help provide an intuitive understanding of the possible price effect of having two separate monopolists at two different industry levels.



Price	Quantity	Total revenue	M's costs	M's profits	R's costs	R's profits
10	1	10	1	9	6	4
9	2	18	2	16	12	6
8	3	24	3	21	18	6
7	4	28	4	24	24	4
6	5	30	5	25	30	0
5	6	30	6	24	36	[negative]
4	7	28	7	21	..	..
3	8	24	8	16	..	..
2	9	18	9	9	..	..
1	10	10	10	0	..	..

It costs $1 to make a widget.

A single monopolist ("M") will maximize his profit by setting a price of $6 and selling 5 widgets. His profit is $24 (represented by the area "rstu").

If M sells widgets for $6 each to an independent retailer ("R") with monopoly power, R will maximize *his* profit by setting a price of $8 and selling 3 widgets. His profit is 6 (represented by the area 'rhgf"). M's best strategy is enter the retailing level of the industry and to set a final price of (roughly) $6.

APPENDIX B

UNITED STATES DISTRICT COURT
D. MASSACHUSETTS

Civ. A. No. 87-1881-C

TOWN OF CONCORD, MASSACHUSETTS and
TOWN OF WELLESLEY, MASSACHUSETTS,
Plaintiffs,

v.

BOSTON EDISON COMPANY,
Defendant.

Aug. 30, 1989

Charles F. Wheatley, Jr., Wheatley & Ranquist, Annapolis, Md., Neil Motenko, Charles R. Parrott, Nutter, McClennen & Fish, Boston, Mass., Albert S. Robinson (Town Counsel), Grindle, Robinson & Kertzman, Wellesley, Mass., for plaintiffs.

Robert J. Stillman, William G. Meserve, William L. Patton, Ropes and Gray, Boston, Mass., John Desmond, Wayne R. Frigard, Boston Edison Co., Boston, Mass., for defendant.

MEMORANDUM

CAFFREY, Senior District Judge.

This antitrust matter was tried before a jury during April and May 1989. After thirteen days of testimony, including that of expert witnesses for both the plaintiff Towns and the defendant Boston Edison, the jury deliberated for three days and, on special interrogatories, returned a verdict of $13.1 million for the plaintiffs.[1] Boston Edison now moves for judgment notwithstanding the

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[1] The jury found for the defendant on Count II, the Robinson-Patman Act claim.

verdict or, in the alternative, for a new trial. Although this case raises novel issues of law in this circuit, under the well-established criteria governing consideration of j.n.o.v. and new trial motions, the jury's verdict should not be disturbed.

I. *Background*

As briefly as possible, we begin by summarizing the relevant facts. The plaintiff Towns of Concord and Wellesley ("Towns") are municipal corporations which own and operate electric distribution systems and engage in the retail distribution of electric power. Defendant Boston Edison Company ("BE") is a vertically-integrated power company which generates, transmits, and sells electric power at both wholesale and retail. BE's retail rates are regulated by Massachusetts law and the Massachusetts Department of Public Utilities, while its wholesale rates are regulated by federal law and the Federal Energy Regulatory Commission ("FERC").

BE currently supplies approximately 95% of the Town's power needs. The remaining 5% is "wheeled" to the Towns by BE from the Power Authority of the State of New York ("PASNY"), also known as the New York Power Authority. Concord constructed its power plant in the late 1890s and Wellesley acquired its plant from a BE predecessor in 1906. Throughout most of this century the Towns negotiated what is known as "firm requirements power" contracts with BE. This type of contract provides that the utility company will meet all of the customer's electricity needs during the life of the contract. The Towns have no generating facilities or power lines of their own linking them to other generating facilities and have always relied on BE's transmission lines to bring electricity to their power plants.

In 1980, after the Towns had commenced litigation concerning an earlier disagreement regarding wholesale rates, BE and the Towns entered into a settlement agreement that provided, *inter alia*, that the Town's wholesale rates

would increase only when BE also increased its retail rates. *See Towns of Wellesley, Concord and Norwood v. Federal Energy Regulatory Comm'n*, 786 F.2d 463 (1st Cir.1986). *See also* 829 F.2d 275 (1st Cir.1987). This "sequencing" provision was contained in Article 3.4 of the settlement agreement. In January 1984, BE notified the Towns that it was cancelling Article 3.4. In February 1984, BE also announced it was cancelling Article 5.1 of the same agreement, which provided that the Towns' rates would remain constant so long as their "load factor" was 54% or greater. At about this same time, the Towns initiated negotiations with PASNY in order to take advantage of low-cost PASNY hydro-electric power that would become available in mid-1985. On July 1, 1985, the Towns began to receive approximately 5% of their power from PASNY, wheeled by BE through its transmission facilities.

In late 1984, BE filed a wholesale rate increase with FERC. The "S-8" increase, as it became known, contained two steps, A and B, and increased the Towns' wholesale rate a total of 8.5%. FERC permits wholesale rate increases to go into effect immediately, subject to later review and possible reduction and refund, if necessary. BE filed no corresponding retail rate increase, as the cancelled Article 3.4 had required. In January 1987, BE filed another wholesale rate increase, S8-PR, which raised wholesale rates an additional 4.4%. Meanwhile, the Tax Reform Act of 1986 had reduced BE's federal corporate tax rate. As part of this tax package, Congress mandated rate relief and, in 1987, BE reduced its retail rates—but not its wholesale rates—to reflect these tax savings.

After July 1, 1985, when the Towns began receiving 5% of their power from PASNY, BE continued to charge them as if they were receiving 100% of their power from BE. In 1986, BE sent the Towns a letter explaining that because the Towns had not given BE five years notice concerning their decision to take PASNY power, BE

would assess an "adverse financial impact" charge of almost $1 million against the Towns. Additionally, in late 1986 BE completed the construction of Transformer 110-C at Station 292 in Newton, which serves Wellesley, and sought FERC approval to charge Wellesley $761,000 for this new equipment. Eventually an administrative law judge determined that Wellesley was not responsible for any part of the cost of Transformer 110-C.

At trial, the Towns argued that these actions by BE constituted anti-competitive conduct in violation of section 2 of the Sherman Act and section 2(a) of the Clayton Act, codified at 15 U.S.C. § 2 and § 13(a), respectively. Specifically, the Towns charged that BE's wholesale rate increases created a "price squeeze" which forced the Towns to raise their retail rates, reduced the profit margin the Towns historically enjoyed, led to the delay of plant improvements and wage increases for employees, and generally reduced the Towns' ability to be competitive in attracting new, and retaining existing businesses and customers. The Towns also asserted that the wholesale rates BE charges them are effectively higher than what BE charges some of its larger retail customers. The Towns sought damages totalling at least $15 million.

BE now seeks a judgment notwithstanding the verdict or a new trial, arguing primarily that the Towns failed to prove that BE has monopoly power in a relevant market or the existence of a price squeeze, that BE's wholesale rate filings are protected by the *Noerr-Pennington* doctrine, and that there is no actual competition between the Towns and BE. For the reasons stated below, BE's motions should be denied.

II. *The J.N.O.V. and New Trial Motion Standards*

The principles governing consideration of a motion j.n.o.v. are by now familiar and

> well-settled in this circuit. The evidence must be viewed in the light most favorable to the plaintiff, giving him the benefit of every favorable inference

> that may be fairly drawn. If fair minded men may draw different inferences and reasonably disagree as to what the verdict should be, the matter is for the jury.

Borras v. Sea-Land Service, Inc., 586 F.2d 881, 885 (1st Cir.1978) (quoting *Dumas v. MacLean*, 404 F.2d 1062, 1064 (1st Cir.1968)). If, after reviewing the evidence and without weighing the credibility of the witnesses, "there is any substantial evidence supporting the verdict, judgment n.o.v. is improper." *Id.* (citing C. Wright, *Law of Federal Courts* § 95, at 473 (3d ed.1976)). "A jury verdict supported by the evidence may not be set aside simply because the judge would have reached a different result." *Ocean State Physicians Health Plan v. Blue Cross & Blue Shield*, 692 F.Supp. 52, 65 (D.R.I.1988), *aff'd*, 883 F.2d 1101 (1st Cir.1989).

In *Freeman v. Package Machinery Co.*, 865 F.2d 1331 (1st Cir.1988), the court reviewed the principles governing consideration of a motion for a new trial:

> [T]he judge's prerogative to set aside a verdict crystallizes only if "it is quite clear that the jury has reached a seriously erroneous result." *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir.1978) (citations omitted). In our litany of cases, we have come to refer to this criterion as the "manifest miscarriage of justice" standard . . .

Milone v. Moceri Family, Inc., 847 F.2d 35, 37 (1st Cir. 1988). Put another way, the district court may order a new trial only if it is convinced that the jury's verdict is "against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice . . . ."

Id. at 1333 (citing *Coffran v. Hitchcock Clinic, Inc.*, 683 F.2d 5, 6 (1st Cir.), *cert. denied*, 459 U.S. 1087, 103 S.Ct. 571, 74 L.Ed.2d 933 (1982); other citations omitted). Setting aside a jury verdict is thus an extraordinary remedy, as it invades "the jury's constitutionally sanc-

tioned role as finder of fact." *Mayo v. Schooner Capital Corp.*, 825 F.2d 566, 570 (1st Cir.1987). It is not enough that "a contrary verdict may have been equally—or even more easily—supportable . . . If the weight of the evidence is not grotesquely lopsided, it is irrelevant that the judge, were he sitting jury-waived, would likely have found the other way." *Freeman*, 865 F.2d at 1333-34. The jury's verdict against Boston Edison is not so grotesquely lopsided or unsupported by the evidence that it should be set aside.

III. *The Substantive Issues*

1. *The Relevant Market.* Defining the relevant market is key to establishing an antitrust violation under section 2 of the Sherman Act. A recent decision of the District Court of Rhode Island offers this succinct definition of the term:

> The terms "monopoly power" and "market power" are generally used interchangeably. "Monopoly power" is the power to control prices or exclude competition in a relevant market. The relevant market is the "area of effective competition" where the defendant operates. Relevant market is identified by the product and its interchangeability plus the geographic area. Usually the trier of fact defines the relevant market.

Ocean State Physicians Health Plan, 692 F.Supp. at 67 (citations omitted).

The Towns and BE both presented evidence concerning the relevant market. The Towns' experts defined the relevant market as BE's service area, where it provides electricity to customers at both retail and wholesale, and testified that BE controls 98% of that market. BE's experts defined the relevant market as the entire New England area and parts of New York and Canada, wherever wholesale electricity is available. According to this definition, BE's share is significantly less, amounting to just

15% of the wholesale market in New England. Based on this conflicting evidence and two special interrogatories which squarely addressed the issue,[2] it is clear that the jury performed its fact-finding function and there is sufficient evidence to support its determination.

Case law also supports this definition of the relevant market. The U.S. Supreme Court recognized a relevant market similar to the Towns' definition in *Otter Tail Power v. United States*, 410 U.S. 366, 369-70, 93 S.Ct. 1022, 1025-26, 35 L.Ed.2d 359 (1973) ("The aggregate of towns in Otter Tail's service area is the geographic market in which Otter Tail competes for the right to serve the towns at retail. That competition is generally for the right to serve the entire retail market within the composite limits of a town, and that competition is generally between Otter Tail and a prospective or existing municipal system . . . [of these towns] Otter Tail serves 91% . . . ."). The Tenth Circuit has also implicitly done so in *City of Chanute v. Kansas Gas & Elec. Co.*, 754 F.2d 310 (10th Cir.1985), *aff'g* 564 F.Supp. 1416 (D.Kan.1983) ("cities and KG & E operate in the retail electric market, are in geographic proximity, and desire to have new customers locate within their respective service areas. As such, they are in competition."). And finally, the Seventh Circuit adopted a similar definition in *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976 (7th Cir.1980), *aff'g* 465 F.Supp. 1320, 1325 (D.Ind.1979) ("It is clear that the relevant product market is electric power and energy . . . 'The geographic location of the market is usually determined by an examination of the areas in which the particular firm actually competes or operates. If it concentrates its sales and service in one area, this area will normally be the relevant market.' "). There is nothing contradictory in the recent decision in *Borough*

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[2] Special questions numbers 1 and 2 asked: "Do you find that plaintiffs proved the existence of a relevant market?" and "Do you find that defendant had monopoly power in the relevant market?" The jury answered "Yes" to both questions.

of Lansdale v. Philadelphia Elec. Co., 692 F.2d 307 (3d Cir.1982). In *Lansdale* the Third Circuit explicitly stated that defining the relevant market is a factual matter for the jury, thus rejecting the plaintiffs' argument that the relevant market should, as a matter of law, be considered the utility's service area. This is the exact procedure followed in the case at bar. In addition, unlike in *Lansdale*, substantial evidence exists here to support the jury's definition of the relevant market.

In conformity with these cases, the Towns presented substantial evidence from which the jury could conclude that the relevant market is BE's service area, and that BE has monopoly power in this market. Monopoly power in itself is not problematic, of course. The Towns must also prove by a preponderance of the evidence that BE "willfully acquired or maintained that power through restrictive or exclusionary conduct" and that the Towns were "injured in [their] business or property because of [BE's] restrictive or exclusionary conduct." *Ocean State Physicians Health Plan*, 692 F.Supp. at 67 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966)). In order to determine whether the Towns suffered any injury to their business or property, we turn to BE's next argument.

2. *The Price Squeeze.* The Towns presented evidence of their injuries in the form of expert testimony concerning a price squeeze resulting from the interplay of BE's wholesale and retail rates. Essentially, BE argues that because FERC eventually determined a "just and reasonable" wholesale rate for the period covered by the S-8 filing, this rate cannot possibly subject BE to antitrust liability. The jury's verdict, in BE's view, "makes a shambles of the regulatory scheme."

It is necessary to place this argument in its proper context. In 1972 the U.S. Supreme Court rejected a similar argument:

> Otter Tail contends that by reason of the Federal Power Act it is not subject to antitrust regulation with respect to its refusal to deal. We disagree with that position.
>
> "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." . . . Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.

Otter Tail Power Co., 410 U.S. at 372, 93 S.Ct. at 1027 (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51, 83 S.Ct. 1715, 1734-35, 10 L.Ed.2d 915 (1963)). This basic principle was restated more forcefully in 1976:

> Indeed, since our decision in *Otter Tail Power Co.* . . . there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities.

Cantor v. Detroit Edison Co., 428 U.S. 579, 596 n. 35, 96 S.Ct. 3110, 3120 n. 35, 49 L.Ed.2d 1141 (1976). Subsequent case law has further refined how this principle operates in a dual-regulation setting, where retail rates are regulated by the state and wholesale rates by FERC. As the Eighth Circuit has described the problem, "the FERC and [the state] each has authority over only one end of the alleged price squeeze, while the antitrust laws can address the entire problem." *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1178 (8th Cir.1982), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 814, 74 L.Ed.2d 1013 (1983). Furthermore,

> [e]nforcing the antitrust laws is not the FERC's paramount objective, and the only remedy the FERC can grant is to reduce the wholesale price to the lower end of the "zone of reasonableness," . . . which, de-

> pending on where the retail price is set, may or may not be enough to eliminate the price squeeze.

Id. (quoting *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 279, 96 S.Ct. 1999, 2004, 48 L.Ed.2d 626 (1976)). After considering arguments identical to those advanced by BE, the Eighth Circuit concluded:

> In sum, the courts may consider a price-squeeze claim without infringing on the regulatory jurisdiction of the FERC and [the state], because the question is not whether the rates themselves are anticompetitive, but whether the defendant utility acted illegally in proposing a certian anti-competitive combination of rates.

Id. at 1179.

As a matter of law, therefore, BE's price squeeze argument is incorrect. Because the Towns presented substantial evidence concerning the effect of the price squeeze on their profit margin, plant improvement, wages, and so on, we find no ground here for disturbing the jury's verdict.

3. *The Noerr-Pennington Doctrine.* Incredibly, BE asserts that the jury's verdict must be overturned on the basis of the *Noerr-Pennington* doctrine, which protects the first amendment right to make one's views known to the government. BE's argument that *Noerr-Pennington* insulates its rate filings from the antitrust laws has been soundly rejected by numerous courts. *See, e.g., Cantor v. Detroit Edison Co.*, 428 U.S. at 601-02, 96 S.Ct. at 3122-23 ("[N]othing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff . . . is a sufficient reason for conferring antitrust immunity on the proposed conduct."); *City of Kirkwood*, 671 F.2d at 1181 ("The *Noerr-Pennington* doctrine will not protect a utility which manipulates the federal and state regulatory processes to achieve anti-competitive results. It is not for expression

of opinion that Kirkwood seeks to compel UE to respond in damages, but rather for UE's conduct in the market place."); *City of Mishawaka*, 616 F.2d at 982 ("It appears to us that the municipalities are not barred by *Noerr-Pennington* . . . Were we to view it otherwise, the federal and state regulatory processes would provide the utility with a method of effectively advancing its illegal monopolistic purposes while maintaining an outward appearance of total innocence and shielded from the Sherman Act"). We need go no further. The *Noerr-Pennington* doctrine simply does not apply to the case at bar.

4. *Competition.* BE also argues that there is no evidence in the record of "actual" competition between it and the Towns. Admittedly, "[i]t is inherently difficult to define competition in the electric-power industry. . . ." *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 930 (2d Cir. 1981). Numerous courts have confronted the issue, however, and the most widely accepted definition of competition in this setting is derived from *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F. Supp. 1343, 1346 (D. Pa. 1979):

> Not only does Penn Power sell power to plaintiffs at wholesale rates, but it is also engaged in the retail distribution of power to customers in the area surrounding plaintiffs' service area . . . For practical purposes, competition between Penn Power and plaintiffs can be seen most strongly in the service of industrial and commercial customers having the option to locate in either the service area of Penn Power or that of plaintiffs . . . If the retail rates of plaintiffs and Penn Power differ, the location choice of the potential customer can be affected by the differential. Plaintiffs and Penn Power also compete, at least theoretically and on a long-term basis, for service areas. If plaintiffs were to become unable to serve their customers profitably, Penn Power would logi-

> cally be in the best position to assume plaintiffs' present service.

Id. As the Second Circuit observed, in this context FERC has recognized three types of competition:

> [c]ompetition for individual customers, including large industrial or commercial loads; franchise competition, for the right to serve all of the customers in a given territory . . .; and fringe area competition, for customers on the fringes of the present service areas of rival utilities.

City of Groton, 662 F.2d at 930. On facts similar to those of the case at bar, one court found as follows:

> The court is also persuaded that potential franchise competition is involved in this case, to the extent that any of the cities, as owners of unprofitable utility systems, would determine it necessary to discontinue operation of their independent systems.

City of Chanute, 564 F.Supp. at 1421.

In conformity with these definitions of competition, the Towns presented evidence and testimony concerning the negative impact of the wholesale rate increases (potential franchise competition); the importance of competitive retail rates to customers straddling the Towns' borders, such as Wellesley College (fringe area competition); and the similarity between the Towns' wholesale rates and the retail rates BE charges some of its large industrial and commercial customers (individual customer competition). BE offered evidence and testimony that disputed the existence of competition in these areas, and the jury's factual determination favoring the Towns is permissible.

5. *Miscellaneous Issues.* BE asserts that the Towns presented no "competent" evidence of damages. The Towns' expert, Dr. Wilson, did testify concerning his calculation of damages, just as BE's expert, Dr. Pace, testi-

fied that he could find no damages. In the words of the Third Circuit:

> The battle of experts was waged in the trial court before the jury. The jury resolved the factual dispute. What Lansdale lost, fairly and squarely, at the hands of a jury cannot be retrieved by converting a factual controversy into an issue of law.

Borough of Lansdale, 692 F.2d at 313. BE also argues that the jury instructions "materially prejudiced" BE's rights. We can only respond that we believe the jury instructions and the special questions accurately and exhaustively detailed the applicable law and those areas where the jury had to resolve factual issues, including the burden on each party. We find BE's remaining arguments unpersuasive.

IV. *Conclusion*

After careful review of the record, we find that substantial evidence exists to support the verdict, thus precluding BE's motion for judgment n.o.v. We also find that the evidence presented at trial is not so lopsided as to constitute a manifest miscarriage of justice, thus precluding BE's motion for a new trial.

So ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

89-1872

TOWN OF CONCORD, MASSACHUSETTS, *et al.*,
Plaintiffs, Appellees,

v.

BOSTON EDISON COMPANY,
Defendant, Appellant.

Before

Breyer, *Chief Judge*,
Campbell and Selya, *Circuit Judges*.

ORDER OF COURT

Entered: May 2, 1990

The parties are requested to brief the following two questions:

1. Can a "price squeeze" engaged in by an electric utility whose wholesale and retail prices are regulated ever amount to "exclusionary" or "unreasonable" conduct?

In answering this question, the parties should refer to the definition of "exclusionary" conduct set forth at 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 626 at 83 (1978), and adopted by this court in *Barry Wright*

Corp. v. *ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983):

> 'Exclusionary' conduct is conduct, other than competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.

The parties should also refer to the definition of "unreasonable" conduct set forth in *Interface Group, Inc.* v. *Massachusetts Port Auth.*, 816 F.2d 9 (1st Cir. 1987):

> '[U]nreasonableness' in antitrust law has a rather special meaning. It means that the anticompetitive consequences of a particular action or arrangement outweigh its legitimate business purposes. *See* 7 P. Areeda, *Antitrust Law* ¶ 1500, at 362-63 (1986). 'Anticompetitive' also has a special meaning: it refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962), a process that aims to bring consumers the benefits of lower prices, better products, and more efficient production methods.

See also Clamp-All Corp. v. *Cast Iron Soil Pipe Institute*, 851 F.2d 478, 486 (1st Cir. 1988); *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988); 3 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 723-729h, at 194-244; P. Joskow, *Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition*, in *Antitrust and Regulation* (F. Fisher ed. 1985).

2. If a "price squeeze" engaged in by a regulated utility can ever constitute "exclusionary" or "unreasonable" conduct, can it constitute such conduct (a) where the utility's retail rates are higher than its wholesale rates, *cf. City of Mishawaka* v. *American Elec. Power Co.*, 616 F.2d 976, 978 (7th Cir. 1980), or (b) where the "price squeeze" is not accompanied by other anticompetitive activity, *cf. id.* at 985-86; Joskow, *supra*, at 199?

The supplemental briefs of the parties will both be due on May 29, 1990.

By the Court,

Francis P. Scigliano
Clerk.

Supreme Court, U.S.
FILED
FEB 21 1991
OFFICE OF THE CLERK

No. 90-1168

In the Supreme Court of the United States

OCTOBER TERM, 1990

TOWN OF CONCORD, MASSACHUSETTS AND
TOWN OF WELLESLEY, MASSACHUSETTS,
PETITIONERS,

v.

BOSTON EDISON COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals followed established principles in holding on the factual record before it that the plaintiffs failed to offer substantial evidence that Boston Edison possessed monopoly power in the relevant market.

2. Whether the Court of Appeals followed established principles in holding on the factual record before it that the plaintiffs failed to prove conduct that was exclusionary within the meaning of Sherman Act § 2.

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In the
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1168

TOWN OF CONCORD, MASSACHUSETTS AND
TOWN OF WELLESLEY, MASSACHUSETTS,
PETITIONERS,

v.

BOSTON EDISON COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Statement

1. *Background.* Boston Edison Company ("Boston Edison")[1] sells electricity to, among others, municipally-owned electric systems in Concord and Wellesley, Massachusetts (the "Towns"). The municipally-owned systems have lawful retail monopolies in their respective towns. The Towns resell to their retail customers (*i.e.*, homes and businesses) the electricity that the Towns buy from Boston Edison. The retail electric rates charged by the Towns to their customers are not regulated and the Towns have enjoyed great success with these systems.

By contrast, Boston Edison's rates are fully regulated. A state agency regulates its retail rates.[2] Boston Edison's whole-

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[1] Pursuant to Sup. Ct. R. 29.1, Boston Edison states that it has no parent or subsidiary companies (other than wholly-owned subsidiaries).

[2] Boston Edison has a lawful retail monopoly in other communities in the Boston, Massachusetts area.

sale rates — including those it charges for selling electricity to the Towns — are regulated by the Federal Energy Regulatory Commission ("FERC").

This action reflects the Towns' dissatisfaction with FERC's rate decisions. As summarized by the Court of Appeals:

> Between 1984 and 1987, Edison filed a series of wholesale rate increases with FERC. Wellesley and Concord vigorously opposed those rate increases before the Commission. In each case, after briefly suspending the rates, the Commission allowed them to take effect subject to refund. The towns sought judicial review of FERC's decisions. Eventually, with one exception not relevant here, this court upheld as lawful the relevant FERC determinations,
>
> Concord and Wellesley then attacked the same wholesale rate increases on another legal front. They brought this antitrust action in federal district court.

Appendix to Petition for a Writ of Certiorari ("Pet. App.") 7a (citations omitted).[3] The Towns claimed that the increases in the prices they pay for wholesale power subjected them to a "price squeeze" constituting monopolization under Sherman Act § 2.

While the Towns continued to buy electricity at wholesale from Boston Edison notwithstanding these price increases, the

---

[3] The Towns purport to summarize those proceedings. Petition for a Writ of Certiorari ("Pet.") 4-7. The Towns' summary is materially inaccurate. Details concerning the myriad issues in the regulatory proceedings are available in reported regulatory and court decisions as follows:

S-8 Filing: 29 FERC 61,460; 30 FERC 61,029, *Town of Wellesley* v. *FERC*, 786 F.2d 463 (1st Cir. 1986); 40 FERC 61,301, *reh. denied*, 43 FERC 61,193; 41 FERC 61,506; *Town of Concord* v. *FERC*, 860 F.2d 1072 (1st Cir. 1988); 42 FERC 61,374, *reh. denied*, 43 FERC 61,309; *Boston Edison Co.* v. *FERC*, 885 F.2d 962 (1st Cir. 1989).

S-8/PR Filing: 36 FERC 61,233, *reh. denied;* 38 FERC 61,112; *Town of Concord* v. *FERC*, 844 F.2d 891 (1st Cir. 1988); 40 FERC 63,048.

S-9 Filing: 41 FERC 71,004, *reh. denied;* 41 FERC 61,161.

Subtransmission Facilities Filing: 38 FERC 61,035; 43 FERC 63,008.

Towns also began making wholesale purchases from another electricity generator, which transmitted this power from the Canadian border to the Towns over Boston Edison's transmission lines. For this service, the Towns paid Boston Edison a nominal transmission charge. Pet. App. 26a. The Towns' counterparts in nearby communities took even greater advantage of the market options open to them: as the Court of Appeals found, those "municipalities to the north, south, east and west of Concord and Wellesley, bought their electricity from production companies other than Boston Edison." Pet. App. 26a. The Towns knew of this flourishing wholesale market. They declined to shop around to a greater degree because, in the words of the Towns' witnesses, they "just didn't want to" unless they were assured in advance of "huge savings." Joint Appendix ("J.A.") 876, J.A. 1040-1041.

During the same period, the municipal electric systems of these two suburban towns earned substantial returns and increased their sales. Pet. App. 24a. The Towns did not lose customers to Boston Edison, and did not give any serious thought to leaving the electricity distribution business. J.A. 757, J.A. 759, J.A. 760, J.A. 876-878, J.A. 1009, J.A. 1013-1014, J.A. 1101-1102, J.A. 1296, J.A. 1325, J.A. 1693.[4]

2. *The Court of Appeals' Opinion*. The Court of Appeals identified two "fatal" problems with the Towns' case.

The Court found that the Towns had "failed to show that Boston Edison possessed monopoly power in the relevant market" — *i.e.*, "the *generation* level, the industry level at which plaintiffs claim Edison charged too high a rate." Pet. App. 25a, 26a (emphasis in original).

The Court of Appeals observed that Boston Edison's 12% share of the New England electricity generating market was "far" less than the 70%-90% of sales thought indicative of monopoly power. Pet. App. 26a.

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[4] The petition's statement closes at p. 11 with a puzzling reference to events "after the court of appeals issued its decision," and perforce outside of the record. Boston Edison offers no comment on the accuracy of matters outside the record below.

The Court of Appeals then analyzed the three pieces of evidence offered by the Towns to support their monopoly power allegation. The first was a study suggesting that Concord would be better off buying from Boston Edison, which over the long run could offer cheaper rates because its rates are based on the historic cost of old, inexpensive units. The study proved (if anything) only that Boston Edison might be able to underprice other sellers, a fact that is "consistent with a perfectly competitive marketplace" and "does not show that Edison has monopoly power." Pet. App. 27a-28a. The second item was a provision in Boston Edison's wholesale tariff on file with FERC.[5] That provision did not give Boston Edison monopoly power because, among other reasons, "the record does not show that the tariff either unreasonably, or significantly, limits a customer's ability to buy from others. To the contrary, the [Towns] have bought power from non-Edison sources . . . despite the provision." Pet. App. 28a. The third set of facts bore on the Towns' allegation that Boston Edison had a monopoly over what "the [Towns] argue [is] the kind of electricity supply service they need — a firm commitment by a generating source to supply their full requirements. . . ." This con-tention failed on the evidentiary record because the only witness with personal knowledge testified that at least one other company would supply wholesale service in this fashion. Pet. App. 28a-30a.[6] The Court of Appeals concluded

[5] This feature of the tariff provides for the Towns to compensate Boston Edison for actual losses it suffers that are caused by the Towns' switch to different wholesale suppliers on short notice. In this case, the dispute relating to this provision arose when the Towns gave Boston Edison less than a week's notice of their decision to buy power from another supplier. *See, e.g.*, J.A. 1284, J.A. 1289-1290, J.A. 1316-1317, J.A. 1394, J.A. 4112.

[6] Boston Edison also argued that so-called firm requirements power, which simply refers to one contractual arrangement among many for buying electricity for resale, failed as a matter of law to describe a distinct market or sub-market. *Compare* J.A. 567, J.A. 673, J.A. 821, J.A. 963, J.A. 1446-1447, J.A. 1448-1450, J.A. 1454, J.A. 1469-1470, J.A. 3879-3881 (describing different ways in which wholesale electricity is bought and sold) *with, e.g., Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962); *Home Placement Service, Inc.* v. *Providence Journal Co.*, 682 F.2d 274, 280 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983). In light of the failure of proof, the Court of Appeals had no need to reach this legal question.

that the record evidence was "simply too skimpy to support a 'monopoly power' conclusion." Pet. App. 30a.

The Court of Appeals also found that on the factual record before it, the "price squeeze" did not constitute exclusionary conduct — acquisition or maintenance of monopoly power by improper means — within the meaning of Sherman Act § 2. The Court of Appeals reached this conclusion by comparing "the challenged practice's likely anticompetitive effects with its potentially legitimate business justifications." Pet. App. 9a. The Court of Appeals left open the possibility that on different facts a wholesale electricity customer could prove that a price squeeze is exclusionary conduct. Pet. App. 25a.

Having identified two fatal flaws in the Towns' case, the Court of Appeals did not expressly rule on numerous other points raised by Boston Edison, including the complete absence of any evidence of competitive injury. However, the Court of Appeals indicated that it would have ruled for Boston Edison on this ground, if reached, observing: "we cannot find significant evidence that Edison's price squeeze deprived plaintiffs of a 'living profit'," as must be established under *United States* v. *Aluminum Co. of Amer.*, 148 F.2d 416, 437 (2d Cir. 1945) *("Alcoa")*. Pet. App. 24a. *See also, e.g., Atlantic Richfield Co.* v. *USA Petroleum Co.*, 110 S.Ct. 1884 (1990); *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562-63 (1981).[7]

Reasons For Denying The Petition

The opinion below decides complex factual issues according to well-settled legal principles. It presents no conflict with the

[7] For the same reason, the Court of Appeals had no need to decide the other grounds upon which Boston Edison sought reversal. Those included the Towns' failure to prove that they actually were competitors with Boston Edison, the conflict between the admission of the Towns' expert evidence and the filed rate doctrine articulated by this Court, the improper recovery of "overcharge" damages that completely duplicated remedies available at FERC, and several erroneous jury instructions.

decisions of other circuits or of this Court, and does not warrant further review. Indeed, neither question posed by the petition is in fact presented in this case.

The Court of Appeals correctly found that there was no evidence of monopoly power in the relevant market. This ruling is compelled by the evidence, is consistent with the decisions of every other court to have considered the issue, and is dispositive of petitioners' claims. There is, therefore, no need to consider petitioners' immunity contentions. In any event, the immunity argument misses the mark because the opinion below did not create an immunity but, instead, found that the Towns had not proven conduct that was exclusionary under Section 2.

1. The Court of Appeals ruled that the Towns failed to prove that Boston Edison had monopoly power in the wholesale market, which is the relevant market for analysis of the price squeeze claim. This holding is dispositive.

The Towns cannot and do not challenge the Court of Appeals' analysis of the evidence. Instead, they unsuccessfully attempt to create an issue with respect to the definition of the relevant market. There is no conflict in the circuits on this point. Every appellate court that has considered the issue of relevant market in a price squeeze context has, with the Court of Appeals below, held that the wholesale market is the relevant market — since without a wholesale monopoly any seller attempting to impose a price squeeze would simply lose customers if it set wholesale prices too high. *Compare* Pet. App. 25a *with Alcoa*, 148 F.2d at 422-425, 436-439; *Bonjorno* v. *Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 808-809 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986). Each of the two circuits which have expressly addressed the issue in an electric utility context have agreed with the opinion below. *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173, 1176 n.4 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Borough of Lansdale* v. *Philadelphia Electric Co.*, 692 F.2d 307, 312 (3d Cir. 1982).

Contrary to the Towns' claim (Pet. 17-18), *City of Mishawaka* v. *American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) (*"Mishawaka II"*), is wholly consistent with the opinion below. *Mishawaka II* did not expressly rule on the market definition question. To the extent the opinion discussed the issue, however, the Seventh Circuit plainly indicated its agreement with the approach expressly adopted by the Third, Eighth and now First Circuits. The Seventh Circuit noted that the district court had found the defendant utility to have a monopoly of retail electric sales "as well as a monopoly of the supply of *wholesale* electric power upon which the municipalities depend." The Court expressly disapproved the utility's threats to the municipalities' "*sources* of power," and commented that "[t]here was no realistic substitute source of *wholesale* power for the cities to turn to." *Mishawaka II*, 616 F.2d at 980, 983, 985 (emphasis added). *Mishawaka II* does not suggest, much less hold, that a showing of monopoly over retail sales would sustain a finding of market power.[8]

The Towns' citation to *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973) also is entirely misplaced. In *Otter Tail*, the Section 2 offense stemmed from the utility's refusal to "wheel" or transmit *wholesale* electric power. Its monopoly power lay in control of (and refusal to share) transmission facilities that were essential for the local distribution companies to get a supply of *wholesale* power. In contrast, the record below "clearly demonstrate[d] that Boston Edison will 'wheel' (*i.e.*, transmit) electricity from other producers to any distributor upon request, all for a nominal transmission charge that no one claims is unreasonably high." Pet. App. 25a-26a. As a

[8] The petition's suggestion that there is a conflict with *City of Groton* v. *Connecticut Power & Light Co.*, 662 F.2d 921 (2d Cir. 1981) (*"Groton"*) is equally unfounded. Relevant market was not an issue in *Groton*. The parties and the Court of Appeals adopted the district court's willingness to "assume arguendo that [the defendant utilities] had monopoly power." *City of Groton* v. *Connecticut Light & Power Co.*, 497 F.Supp. 1040, 1052 n.14 (D. Conn. 1980), *aff'd in part and vacated in part on other grounds*, 662 F.2d 921 (2d Cir. 1981).

result, the Towns (like similarly-situated municipal systems) were free to buy and did buy electric power from suppliers other than Boston Edison.[9]

In the absence of proof of monopoly, there can be no claim under Section 2 of the Sherman Act. There is, therefore, no occasion to consider other arguments raised by the petition, which are, in any event, without merit.

2. The Towns' characterization of the opinion below as creating an immunity disregards both the language and holding of the Court of Appeals. The Court of Appeals explicitly pointed out that "we *are not* saying either that the antitrust laws do not apply in this regulatory context, or that they somehow apply less stringently here than elsewhere." Pet. App. 11a (emphasis in original). Lest there be any doubt, the Court of Appeals also said: "[e]ven though Boston Edison is a regulated firm, it has no blanket immunity from the antitrust laws." (Pet. App. 8a). The petition's discussion of immunity principles is simply beside the point.

3. The Court of Appeals' holding on the substance of the Towns' claim is, by its own description, a limited one. It is that normally a price squeeze is not exclusionary conduct where both wholesale and retail sales are regulated. That conclusion is confirmed by the record in this case, and the Court of Appeals left to another day whether circumstances not present here would dictate a different result.

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[9] There is nothing to the Towns' suggestion that their reliance on Boston Edison for transmission services sufficed to show that Boston Edison had monopoly power, under an "essential facilities" theory. Pet. 20-21. The Towns waived any such argument below. The district court declined to submit the case to the jury on an essential facilities theory, *compare* J.A. 266-68 *with* J.A. 1816. The Towns did not object to this refusal, and the jury's verdict for the Towns plainly cannot be sustained on the basis of a theory which the jury was not asked to consider. *Northeastern Telephone Co.* v. *Amer. Tel. & Tel. Co.*, 651 F.2d 76, 93 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

It was, in any event, plainly correct not to submit the case on an essential facilities theory, since the Towns did not submit any evidence of denial of access. *Compare* Pet. App. 25a-26a *with, e.g., MCI Communications Corp.* v. *Amer. Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). *See also* n.13, *infra*.

The Towns' assertion of conflict among the circuits is, again, off the mark. The case law involving price squeeze claims against a regulated utility is small in number and not well developed. Observing that some reported opinions have suggested (or assumed) that a price squeeze may be unlawful in the regulated electricity industry, the Court of Appeals succinctly and correctly explained that these cases had not decided the issue presented in this case:

> In only one of those cases, however, did the court actually enter, or affirm, a judgment against the defendant; thus, there is extremely little case law *holding* that a public utility price squeeze is exclusionary. Moreover, in all of the cases we have cited, the price squeeze allegation was but one of several allegations of several different kinds of exclusionary conduct, and the one court that affirmed a Sherman Act § 2 judgment against a utility stressed that it might well *not* have done so had the price squeeze stood alone (as it does in the case before us). *See Mishawaka II*, 616 F.2d at 986 (suggesting that "no one aspect [of the defendant's conduct] standing alone is illegal").

Pet. App. 24a (emphasis in original).

The Towns' particular assertion that the opinion below conflicts with the *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) (*"Kirkwood"*), *Groton* and *Mishawaka II* decisions is incorrect. *See* Pet. 12-13. The Court of Appeals correctly observed that none of these decisions directly dealt with the issues raised by the opinion below.

Kirkwood reviewed a district court's ruling, on summary judgment, that immunity principles barred it from considering the merits of the municipalities' claim. The Eighth Circuit reversed and remanded the case for proceedings on the merits

— including, presumably, the question whether the conduct alleged was exclusionary.[10]

Groton reviewed a district court's ruling, after trial on the merits, that the plaintiff municipalities had failed to prove an antitrust violation. The Second Circuit found that the lower court had failed to apply the proper legal standard for judging whether the municipalities had established other elements of their claim — competition and competitive injury — and accordingly remanded for further factual development. *Groton*, 662 F.2d at 930, 934-35.[11] The issue of whether a price squeeze itself amounted to exclusionary conduct was not addressed, and apparently was not argued to the Court of Appeals.

Mishawaka II is the only decision to uphold a judgment that was based to any degree upon a finding that an electric utility's rate filings created a price squeeze. But the price squeeze claim was only one of many challenged exclusionary practices in *Mishawaka II*, including a finding that the defendant utilities had threatened to cut off the municipalities' supply of wholesale power. This threatened refusal to wheel is precisely the kind of conduct that this Court has found to violate Section 2. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973).[12] The Seventh Circuit indicated, however, that it might have found no Section 2 violation if, as here, the price squeeze stood alone as the sole conduct alleged to be exclusionary. *Mishawaka II*, 616 F.2d at 986.[13] Thus, to the extent that

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[10] The petition does not seriously dispute this reading of *Kirkwood*. Instead, the petition asserts a conflict based solely on the false premise that the First Circuit decided the case below on *immunity* grounds. *See* Pet. 14 & n.4.

[11] On remand, the district court again found for the defendant utilities on the merits. *City of Groton* v. *Connecticut Light & Power Co.*, Slip Op., C.A. No. 15,609 (D. Conn. Jan. 31, 1986).

[12] *See also Groton*, 662 F.2d at 932.

[13] The petition claims that the Towns, too, proved other conduct that is acknowledged to be exclusionary. Specifically, Towns assert:

> as the court below recognizes elsewhere, the Towns presented evidence that Edison had also used its undisputed monopoly control over the transmission of electricity to put the Towns at a competitive disadvantage. App. 25a-26a.

Pet. 13 n.3.

the Seventh Circuit focused on the price squeeze claim alone, the opinion suggests agreement with the Court of Appeals here. Certainly, there cannot be said to be a conflict between them.[14]

On the merits, the opinion below rests on sound principles that were confirmed by the extensive evidentiary record. The Court of Appeals observed that even in the context of unregulated firms, a rule labelling "price squeeze" as unlawful conduct has nearly equal costs and benefits. Pet. App. 12a-17a. The Court of Appeals then found that the presence of dual rate regulation normally will tip the balance against finding "price squeeze" to be a form of exclusionary conduct. Regulation makes it less likely that a price squeeze will raise entry barriers (the primary antitrust problem created by a price squeeze). *See* Pet. App. 13a-14a, 18a. In addition, regulation makes it less likely that a price squeeze in fact would eliminate competitors from the marketplace, an intuition amply borne out by the record evidence showing that the Towns' distribution systems flourished despite the alleged "squeeze." Pet. App. 19a, 24a.

In fact, the Court of Appeals said:

> The plaintiffs, however, *cannot show* (indeed, with one exception, they do not try to show) that Boston Edison used its control of electricity *transmission* to their disadvantage. To the contrary, the record clearly demonstrates that Boston Edison will "wheel" (*i.e.*, transmit) electricity from other producers to any distributor upon request, all for a nominal transmission charge that no one claims is unreasonably high. *See* Record Appendix at 1442, 1451-52, 1704-05. . . . The only arguably contrary evidence in the record consists of Concord's claim that Boston Edison refused to connect it to a 115 kv line; but the record does not (1) suggest that Concord needs that connection to buy electricity elsewhere, (2) indicate that the dispute concerns anything other than the connection price, or (3) show that the demanded connection price was unreasonably high.

Pet. App. 25a-26a (emphasis partly added and partly in original).

[14] As the earlier decisions did not analyze in any detail whether a price squeeze in this context is exclusionary, there also is no conflict merely because the Court of Appeals' "reasoning and analysis" took a different direction than that of earlier opinions. *See* Pet. App. 24a.

On the other side of the equation, the First Circuit found that an antitrust price squeeze action threatens the antitrust goal of lower prices if, for example, a utility seeks to avoid a wholesale price squeeze claim by attempting to raise retail rates. Pet. App. 20a-21a. In addition, the prize squeeze action presents "special administrative difficulties" in this context. Pet. App. 21a. Juries effectively would be asked to second guess the regulator's cost and investment allocation decisions, as appeared to have occurred here, Pet. App. 21a-22a, and utilities potentially would face liability for requesting permission to charge a Constitutionally-guaranteed, non-confiscatory wholesale rate. Pet. App. 21a, *citing to, inter alia, Bluefield Water Works & Improv. Co.* v. *Public Serv. Comm'n*, 262 U.S. 679, 690 (1923).

A further reason for denying review is that this case does not squarely present the issue of whether a price squeeze constitutes exclusionary conduct. The complex factual record below was particularly hostile to a finding that the price saqueeze here was exclusionary, and that record undoubtedly influenced the opinion below.

The Towns could have bought at wholesale from other suppliers, and Boston Edison did not interfere with transmission of power to the Towns or raise any other threat to their power supply — simultaneously demonstrating that Boston Edison did not have monopoly power and belying the Towns' claim that they were, in fact, squeezed by Boston Edison's electricity rates.

The Towns suffered no competitive harm — loss of specific customers or the like — and the Court of Appeals indicated that this failure of proof provided a further reason for rendering judgment for Boston Edison. The Towns' theory of "potential harm" was that customers who have a choice where to locate "*might* decide to forego Concord and Wellesley and settle in a town served by Edison." Pet. App. 8a (emphasis added). However, there was no "significant evidence" that Boston Edison's prices had deprived the Towns of a living profit, "for the plaintiffs earned substantial returns, and even increased

their sales, during the price squeeze period." Pet. App. 24a. As this Court reemphasized last term, proof of competitive harm is essential in any damages action for alleged violation of the antitrust laws. *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 110 S.Ct. 1884 (1990).

4. The issues asserted in the petition are not of widespread importance, even assuming they were raised by this case. This is the first appellate decision in nearly a decade to address the price squeeze issue, and the first ever reviewing a plaintiffs' judgment where the price squeeze was not accompanied by threats to the municipal's wholesale power supply. No case ever has found a price squeeze to cause actual loss of customers or to cause a change in ownership of the retail distribution monopoly. At the same time, FERC has repeatedly reaffirmed its commitment to adjust wholesale electric rates to remove even potential anticompetitive effects of particular wholesale-retail rate relationships. *See, e.g., Southern California Edison Co.*, 50 FERC ¶61,275 (1990).[15] Far from an issue with important practical consequences, the price squeeze cause of action is a legal theory in search of a problem.[16]

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[15] There is no merit to the suggestion that the decision below will undermine the legal basis for consideration of price squeeze claims by the FERC. Pet. 22. The Court of Appeals expressly took note of the protection that is afforded wholesale customers by FERC's ability and duty "to consider the alleged price squeeze harm," in accordance with *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976). Pet. App. 23a.

[16] *See* Joskow, *Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition*, in *Antitrust and Regulation*, 173, 186 (F. Fisher ed. 1985).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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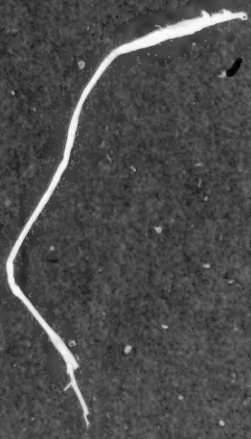

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TOWN OF CONCORD, MASSACHUSETTS and
TOWN OF WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Aside from its efforts to relitigate factual issues resolved against it by the jury below,[1] Boston Edison ("Edison") does no more than demonstrate what is evident from the text of the court of appeals' decision: that the First Circuit made a half-hearted attempt to shield from further review a landmark ruling on an important issue of antitrust law. The importance of this issue—*i.e.*, whether a system of "dual" federal and state regulation shields a utility from antitrust liability for a price squeeze—is demonstrated not only in the petition for certiorari, but also in the briefs *amici curiae* of the American Public Power Association and the National Rural Electric Cooperative Association ("APPA/NRECA"), the National Association of Gas Consumers ("NAGC"), and the cities of Anaheim, Riverside, Banning, Colton and Azusa, California ("Cities").

Edison's attempt to escape the clear conflict between the decision below and decisions of the Seventh and Eighth Circuits rests entirely upon specious semantic arguments and misinterpretations of those decisions. Edison's principal strategy on certiorari—its reliance on the court of appeals' alternative holding with respect to Edison's monopoly power—is similarly misguided. In addition to its erroneous assumption that petitioners bear the burden

[1] For example, Edison's contention that the Towns suffered no injury as a result of Edison's price squeeze (Opp. 12-13) was rejected by the jury and the district court. See Pet. App. 45a-46a. As Edison itself admits (Opp. 5 n.7), the court of appeals did not overturn the findings of the district court on this issue. In fact, the evidence presented at trial showed that, during the period from 1984 until the trial below, Edison's price squeeze forced the Towns to charge higher rates to their large commercial customers than Edison did. J.A. 844-47, 864-65, 918-30, 1079-80, 3394. As a result, the Towns lost sales (J.A. 1241-44, 1785-86, 3488) and millions of dollars in revenue (J.A. 1005-06, 1008-10, 1064-65, 1075-80). Also, employee wages had to be kept down, reducing the ability of the Towns to compete in the labor market. J.A. 1005-06.

of demonstrating that *both* questions presented are independently worthy of review, Edison's argument overlooks two critical points: (1) the court of appeals' analysis of monopoly power rests upon the same erroneous premises as the court's principal holding; and (2) that analysis presents an important legal issue that is, in fact, indedently worthy of this Court's review.

1. Edison's first and primary response to the Towns' analysis of the court of appeals' dual regulation holding is to quibble with petitioners' characterization of that holding. In particular, Edison disputes the Towns' statement that the decision below created an antitrust "immunity" from price-squeeze claims. Respondent's Brief in Opposition ("Opp.") 6, 8. To be sure, the court of appeals was careful to point out that it was not giving utilities subject to dual regulation a "*blanket* immunity from the antitrust laws" (Pet. App. 8a; emphasis added) and therefore did not hold that "the antitrust laws do not apply" to such utilities (Pet. App. 11a). But the court of appeals did not dispute that the effect of its holding was to create an immunity *from price squeeze claims.* To hold as a general matter that dual regulation prevents a price squeeze from being exclusionary (Pet. App. 11a-12a, 18a-19a, 23a) in effect creates a limited immunity for a utility subject to dual regulation.

In short, whether the court's holding is labeled a "defense" or an "immunity" makes no practical or analytical difference. The point is that conduct which clearly *would* be a violation of the antitrust laws under standard antitrust principles is shielded from antitrust liability by the fact of dual regulation.

But no matter how the ruling is characterized, its breadth and importance cannot be doubted. Edison's brief nevertheless attempts to convey the false impression that the decision of the court of appeals was somehow dependent upon—and limited to—"the factual record before it." Opp. 5; see also *id.* at 8, 11, 13. This contention not only

ignores the procedural posture of this case,[2] but also distorts the court of appeals' opinion. First, the opinion began by stating the issue before the court in extremely broad terms: "The chief question raised by this appeal is whether a pricing practice known as a price squeeze violates the antitrust laws when it takes place in a fully regulated industry." Pet. App. 2a. Without acknowledging that this "chief question" was first raised on appeal by the panel itself rather than by Edison (see Pet. 9-10; Pet. App. 47a), the court then summarized its holding as follows: "our analysis of the likely effects of a price squeeze in a fully regulated industry leads us to conclude that the answer is no." Pet. App. 3a. Second, the "analysis" of this issue performed in Section II of the court's opinion is a lengthy, law review-style discussion of economics literature, antitrust treatises, and case law. It contains no analysis of the record before the court.[3]

Edison next makes a weak attempt to escape petitioners' demonstration—and the First Circuit's own admission—that the decision below conflicts with the Seventh Circuit's decision in *City of Mishawaka* v. *American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980) (*"Mishawaka"*), *cert. denied*, 449 U.S. 1096 (1981), and the Eighth Circuit's decision in *City of Kirkwood* v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982) (*"Kirkwood"*), *cert. de-*

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[2] Edison's reliance upon the record in this case is a bit odd given that Edison lost before the jury, whose findings were upheld by the district court as supported fully by the record. It was only the court of appeals' *legal* holdings that permitted Edison to escape liability under the Sherman Act.

[3] Edison nonetheless contends that the court of appeals' holding on the dual regulation issue is "a limited one" (Opp. 8) apparently because the court "left open the possibility" of a successful price squeeze claim "on different facts" (*id.* at 5). To be sure, the court of appeals stated that it was "leaving cases involving *exceptional circumstances* for another day." Pet. App. 25a (emphasis added). But an undefined exception for "exceptional circumstances" does not diminish the gap in the antitrust laws created by the court of appeals' holding.

nied, 459 U.S. 1170 (1983). See Pet. 12-14. With respect to *Mishawaka*, Edison admits that the Seventh Circuit "uph[e]ld a judgment . . . that an electric utility's rate filings created a price squeeze" (Opp. 10), and further held that this price squeeze constituted a "Section 2 violation" (*id.*). See also 616 F.2d at 983-84 (dual regulatory scheme "offers an obvious, ready made *illegal* opportunity [to engage in a price squeeze] with a legitimate gloss") (emphasis added). Nor does Edison dispute that the Seventh Circuit expressly rejected the "dual regulation" analysis adopted by the court below: after noting that "we are considering an industry subject to both federal and state regulation," the Seventh Circuit held that "that circumstance [does not] justif[y] an antitrust exemption." 616 F.2d at 985.

Edison's incredible suggestion that *Mishawaka* is nonetheless in "agreement with the Court of Appeals here" (Opp. 10-11) is based solely upon a passage in which the Seventh Circuit rejected an argument by the defendant that the court should "consider each separate aspect of its conduct separately and in a vacuum." 616 F.2d at 986. The Seventh Circuit stated that, if it had done this, "we might agree with the utility that no one aspect standing alone is illegal." *Id.* Putting aside Edison's blatantly false statement that in this case the price squeeze is the "sole conduct alleged to be exclusionary" (Opp. 10),[4] the Seventh Circuit's statement in no way diminishes the conflict between *Mishawaka* and the decision below. The dispositive point is that the judgment against the defendants in that case was affirmed, at least in substantial part, on the basis of the plaintiffs' price squeeze claim. See 616 F.2d at 978, 983-85. Had the Seventh Circuit ap-

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[4] As Edison itself recognizes elsewhere (Opp. 10-11 n.13), the Towns alleged—and demonstrated at trial—that Edison had used its undisputed monopoly control over the transmission of electricity to put the Towns at a competitive disadvantage. See Pet. 3-6, 13 n.3. Thus, even if *Mishawaka* were read to require evidence of anticompetitive activity in addition to a price squeeze, that requirement was plainly satisfied here.

plied the "dual regulation" rule now adopted by the First Circuit in this case, it could not have simply affirmed the decision of the district court. Neither the decision below nor Edison's brief disputes this fundamental point.[5]

Edison's argument that the decision below does not conflict with the Eighth Circuit's decision in *Kirkwood* is equally erroneous. Edison does not dispute the district court's statement below that the Eighth Circuit in *Kirkwood* had squarely rejected a legal challenge to a price squeeze claim that was "identical" to the claim asserted by Edison and ultimately adopted by the First Circuit. Pet. App. 42a-43a. Nor does Edison dispute the court of appeals' statement below that its "reasoning and analysis differ[] significantly from that in" *Kirkwood*, among other decisions. Pet. App. 24a. And the dispositive point —also not disputed by Edison—is that the result in *Kirkwood* would have been different if the Eighth Circuit had applied the rule articulated by the court below: the Eighth Circuit's rejection of the dual regulation defense (or immunity) in that case was plainly necessary to the judgment reversing the district court's grant of summary judgment for the utility defendant. See Pet. 14 n.4.

Edison's sole argument with respect to *Kirkwood* is that, according to Edison, *Kirkwood* was decided on immunity grounds rather than on exclusionary conduct grounds. See Opp. 9-10. However, as discussed above (*supra* p. 2), this distinction is purely semantic. In-

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[5] In any event, Edison ignores the Seventh Circuit's own explanation of the statement on which Edison relies. Immediately after the passage cited in the text, the Seventh Circuit stated: "We have recognized previously that '[t]here are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under § 2 if done by a monopolist . . .'" 616 F.2d at 986. Thus, the court's statement that "no one aspect standing alone is illegal" was merely a restatement of the unremarkable principle that monopoly power can make otherwise benign behavior unlawful.

deed, the Eighth Circuit recognized the broad scope of its holding when it stated that every court that had previously addressed the issue "came to the same conclusion we do, namely that a municipality's price-squeeze claim is cognizable under the antitrust laws" when asserted against a utility subject to dual regulation. 671 F.2d at 1177 n.8 (citing, *inter alia*, *Mishawaka* and *Groton*). By contrast, the First Circuit clearly held that ordinarily a price squeeze by such a utility is not a violation of Section 2, and that a price-squeeze claim by a municipality is therefore *not* "cognizable under the antitrust laws." The conflict between *Kirkwood* and the decision below could hardly be more plain.[6]

In sum, notwithstanding Edison's revisionist arguments, the primary holding below is a landmark antitrust ruling that squarely conflicts with both *Mishawaka* and *Kirkwood*. It demands review by this Court.

2. Ironically, the great bulk of Edison's brief is devoted to an issue that was only an afterthought in the court of appeals' decision—the question of Edison's monopoly power. Edison apparently believes that the court of appeals' holding on this point is a barrier to this Court's granting certiorari on the issue presented by the court of appeals' principal holding. See Opp. 6. Edison is wrong. As a general matter, the existence of an alternative holding *on a federal-law ground* is no barrier to review of another holding that is otherwise worthy of review.[7] Hence, the Towns do not bear the burden of dem-

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[6] Edison's misreading of *City of Groton* is equally clear. Not only did the Second Circuit indicate that the alleged price squeeze (if proven) was exclusionary conduct, it even adopted a rebuttable presumption that a discrepancy between wholesale and retail rates always has an anticompetitive effect. *City of Groton* v. *Connecticut Light & Power*, 662 F.2d 921, 934-35 (2d Cir. 1981).

[7] See, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 247 n.12 (1981) ("An order limiting the grant of certiorari does not operate as a jurisdictional bar. We may consider questions outside the scope of the limited order when resolution of those questions is necessary for the proper disposition of the case.") (citations

onstrating that the second issue presented in their petition is independently worthy of review in order for this Court to grant certiorari on the first issue. But even if the Towns ordinarily would bear this burden, the court of appeals's monopoly power holding presents no barrier to review of the dual regulation immunity holding for two additional reasons.

First, as demonstrated in the petition (Pet. 19 n.7) and the brief for *amici* APPA and NRECA (APPA/NRECA 9, 15), the First Circuit's decision on the question of monopoly power is not a separate and independent basis for the decision below. Rather, the opinion rests on the same flawed notion that "regulatory rules, constraints, and practices" (Pet. App. 12a) effectively prevent a transmission monopolist such as Edison from exercising market power. For example, in dismissing the Towns' contention that the five-year notice provision (coupled with the availability of "adverse impact" charges for its violation) in Edison's wheeling tariff effectively gave Edison monopoly power at the wholesale level, the First Circuit noted that the Towns "remain free to challenge before FERC any unreasonably high charge that Edison might try to assess under this provision." Pet. App. 29a.

The court of appeals' assumption about the effectiveness of FERC regulation is contrary to the views expressed to this Court by the Department of Justice in *Kirkwood* (See Pet. 15-17), as well as the analyses of many other federal courts.[8] Moreover, as demonstrated

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omitted); *Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356 (1973) (granting review of authority of Federal Reserve to issue regulation; reversing on that issue as well as alternative holding of court below); *Spevak* v. *Klein*, 385 U.S. 511 (1967) (reversing lower court on both granted ground and alternative holding).

[8] See *MCI Communications Corp.* v. *AT & T Co.*, 708 F.2d 1081, 1107 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) ("[I]n assessing the existence of monopoly power. . . . th[e] analysis must focus directly on the ability of the regulated company to control prices or exclude competition—an assessment which, in turn, requires close scrutiny of the regulatory scheme in question"); *Cities of Anaheim*,

by APPA and NRECA, the First Circuit's assumption is contrary to FERC's own detailed consideration of this precise question (APPA/NRECA 9 n.4) as well as FERC's limited view of its authority over wheeling arrangements (*id.* at 9-11). Because the court of appeals' monopoly power holding suffers from the same fundamental misconception about the effectiveness of regulation as the court's dual regulation holding, the former clearly cannot shield the latter from further review.

Second, as demonstrated in the petition, the court of appeals' monopoly power holding presents a clean legal issue that is itself important and worthy of review: whether a monopoly at the wholesale level is not only sufficient, but also *necessary*, to satisfy the monopoly power requirement in a case involving a price squeeze. See Pet. 9, 11, 17-22. Edison does not dispute that it possesses a monopoly at both the retail and the transmission levels. Pet. 9, 11. Edison also agrees with petitioners that, in the decision below, the First Circuit has now joined the Third Circuit in squarely holding that a wholesale monopoly is necessary in a price squeeze case. Opp. 6.[9]

1990-2 Trade Cas. (CCH) ¶ 69,246 at 64,900 (C.D. Cal. 1990) ("The presence of regulation limits, but does not wholly negate, Edison's ability to control prices and to obtain monopoly profits. 'Insensitivities, gaps or delays' in the system of regulation may enable the regulated monopolist to obtain more than competitive returns and to improperly affect actual or potential competition in a related market"); *State of Illinois* v. *Panhandle Eastern Pipe Line Co.*, 730 F. Supp. 826, 904 (C.D. Ill. 1990) (a reviewing court must consider "the interrelationship between the particular anticompetitive practices at issue and the regulatory scheme under which the defendant operates, to determine whether the regulations effectively counter such abuses").

[9] Edison incorrectly contends that *Kirkwood* reached a similar result. In that case, the only allegation with respect to relevant market was that the utility had "a regional monopoly over the wholesale supply of electric power." 671 F.2d at 1176. Thus, the Eighth Circuit's decision in *Kirkwood* had no occasion even to consider whether a retail or transmission monopoly would be sufficient to satisfy the monopoly power requirement of a Section 2

Edison is incorrect, however, in claiming that there is no conflict on this issue. Edison fails to even acknowledge, much less address, the district court's express holding in *Mishawaka* that a retail monopoly is sufficient. See Pet. 17-18. Edison also fails to acknowledge or address the Fourth Circuit's express affirmance of *all* of the district court's findings, "findings with which," in the Seventh Circuit's words, "we are in accord." 616 F.2d at 985; see Pet. 18.[10] As a result of this express affirmance, the rule articulated by the district court in *Mishawaka* is now the law of the Seventh Circuit, and it is plainly in conflict with the rule which now prevails in the First and Third Circuits. See *Cities of Anaheim* v. *Southern California Edison Co.*, 1990-2 Trade Cases (CCH) ¶ 69,246 at 64,899-900 (C.D. Cal. 1990) (contrasting *Mishawaka* and *Lansdale*).

Perhaps most remarkably, Edison does not dispute that its transmission monopoly satisfies the monopoly power requirement of Section 2 as a matter of law because (1) Edison's transmission charges are included in the "wholesale" rates filed with the FERC, and therefore (2) any manipulation of Edison's wholesale rates for exclusionary purposes represents an abuse of Edison's transmission monopoly. See Pet. 20. Nor does Edison dispute that the court below erred in announcing the sweeping rule that a utility's willingness to wheel power, in combination with FERC's authority over wheeling agreements, requires that the relevant market include all sources of electricity that can be wheeled to the plaintiff. For reasons explained in the petition (Pet. 18-19 n.7) and in the brief of *amici* APPA and NRECA (APPA/NRECA 7-15), this holding is erroneous, enormously important, and at odds with deciisons of the Second, Third and Seventh Circuits.

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claim. The footnote cited by Edison (*id.* n.4) does not purport to resolve this issue.

[10] Contrary to Edison's contention (Opp. 7), none of the Seventh Circuit statements cited by Edison remotely suggests that a retail monopoly is insufficient.

3. Finally, Edison's assertion that "[t]he issues asserted in the petition are not of widespread importance" (Opp. 13) rests upon the same erroneous assumptions about the efficacy of FERC regulation that have been repeatedly rejected by the Department of Justice, other lower courts, and the FERC itself. See *supra* 7-8. As the brief of *amici* APPA and NRECA makes clear, the decision below will substantially increase the rates paid by millions of customers of the 2000 municipal utilities and rural electric cooperatives that purchase their electricity from investor-owned utilities. And, as demonstrated by the brief of *amici* NAGC, it will have the same effect on customers of over 200 municipal natural gas distribution systems.

Indeed, the likely nationwide effects of the decision below (outside the Seventh and Eighth Circuits) are dramatically illustrated by Edison's own decision, when the ink was barely dry on the First Circuit's opinion, to increase the Towns' wholesale rates by a whopping 29 percent. Pet. 11-12, 22; see *Boston Edison Co.*, 54 FERC ¶ 61,105 (Feb. 5, 1991). Edison finds it "puzzling" (Opp. 3 n.4) that the Towns would mention this incredible abuse of Edison's new-found immunity from the antitrust laws, but it is not puzzling to the Towns why Edison would not "comment on the accuracy of" the Towns' submission. Edison's remarkable filing—which is a matter of public record—speaks for itself. It provides an additional, compelling reason for this Court to review the decision below.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 27, 1991

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No. 90-1168

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TOWN OF CONCORD, MASSACHUSETTS AND
TOWN OF WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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---

MOTION OF THE AMERICAN PUBLIC POWER ASSOCIATION AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The American Public Power Association ("APPA") and the National Rural Electric Cooperative Association ("NRECA") hereby request, pursuant to Rule 37 of the Rules of this Court, leave to file the accompanying brief as *amici curiae* in support of petitioners. *Amici* obtained the consent of the petitioners to the filing of the accompanying brief. Respondent, however, has refused to grant its consent.

The APPA is a national service organization representing more than 1,750 of the nation's nearly 2,000

local publicly-owned electric utilities. Operating in 49 states, APPA members include municipal utilities, state power authorities, public districts, and other public power systems that generate, transmit, and distribute electricity. Members range in size from the Los Angeles Department of Water and Power in California, to smaller communities such as Manassas, Virginia, Easton, Maryland, and Jasper, Texas. While public power systems own, either solely or jointly, over 11% of the nation's installed generating capacity, nearly 500 public systems purchase all of their power requirements from utilities subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), and another 300 to 400 systems rely on FERC-regulated investor-owned utilities for at least part of their electricity.

The NRECA is a national service organization representing 97% of the nation's approximately 1,000 rural electric systems. Member systems provide electricity to approximately 25 million people in 46 states. Approximately 60 rural electric systems generate and transmit bulk power at wholesale to their member-owner distribution cooperatives; another 900 serve solely as distributors, purchasing power from a variety of generation sources and delivering it to their consumer-owners. Collectively, *amici* APPA and NRECA serve nearly 25% of the nation's electricity consumers.

Municipal and rural electric systems have long competed at the retail level with investor-owned utilities. Such "yardstick competition," which helps restrain the pricing behavior of private utilities to the benefit of all electric consumers, has been facilitated in recent years as the industry has grown more reliant on market forces, rather than regulation, to guide allocation and resource development decisions. Many public power and rural electric systems, however, compete at the retail level with the very utilities upon which they depend for power.

Such systems are particularly vulnerable to two types of anticompetitive practices. First, these systems are generally isolated islands surrounded by the service territory of their supplying utility, and can only receive power over that utility's transmission facilities. By refusing to "wheel" (i.e., transmit) power from other sources over these transmission lines, or by agreeing to do so only on unreasonable terms, the utility can prevent its wholesale customer/retail competitor from gaining access to alternative sources.

Preventing a captive customer from reaching alternative sources of bulk power sources creates the opportunity to engage in the second anticompetitive practice—the "price squeeze." This occurs when the wholesale supplier charges its public power or rural electric customer a wholesale rate that approximates, or exceeds, the retail rate the utility charges its own retail customers. This practices makes it impossible for the power-dependent distributor to compete with the supplying utility for retail customers. If prolonged or severe enough, a price squeeze can force the municipal or rural electric system out of the market.

Accordingly, like firms in other competitive markets, public power and rural electric systems that compete with their wholesale suppliers often depend upon the availability of antitrust actions to ensure—or to compel—fair treatment by their suppliers. The decision below, however, eliminates many of the protections that the antitrust laws were intended to afford competitors—and ultimately consumers—and, at the very time when the electric utility industry is growing increasingly competitive, relegates power-dependent municipal and rural electric systems to whatever protections regulation affords. Under the First Circuit's reasoning, utilities subject to federal and state regulation are essentially immune from suit for an anticompetitive price squeeze. Similarly, under the court of appeals' analysis, as long as a utility offers to wheel power in some circumstances, the ex-

tremely limited remedial authority of the FERC over wheeling arrangements prevents the utility from being sued for depriving wholesale purchasing utilities from obtaining access to alternative sources of power. Because the court of appeals' reasoning and holdings implicate the interests of public power and rural electric systems across the nation—particularly, though not exclusively, those that are dependent on utilities for their power and transmission needs—*amici* wish to present their views and to urge the Court to grant the petition for a writ of certiorari filed by the Towns of Concord and Wellesley.

For the foregoing reasons, *amici*'s Motion for Leave to File a Brief in Support of Petitioners should be granted.

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QUESTIONS PRESENTED

1. Whether public utilities, whose wholesale rates are regulated by a federal agency and whose retail rates are regulated by a state agency, enjoy a judicially created antitrust immunity under Section 2 of the Sherman Act when they impose a "price squeeze" upon their wholesale customers that compete with them in the same retail market.

2. Whether the court of appeals erred as a matter of law in overturning a jury finding of monopoly power in this case even though it was conceded that the defendant possessed monopoly power in both retail sales and transmission of electric power.

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BOSTON EDISON COMPANY,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is fully set forth in the Motion for Leave to File a Brief in Support of Petitioners.

ARGUMENT

This Court has long recognized that "the federal antitrust laws are applicable to electric utilities." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 596 n.35 (1976). The decision below, however, carves out two huge exceptions to the courage of these laws by holding, first, that a public utility subject to dual regulation is immune from suit for an anticompetitive price squeeze, and second, that a utility's ostensible willingness to wheel electricity, coupled with the FERC's jurisdiction over wheeling agreements, effectively precludes a court or jury from finding that a utility has unlawfully exercised monopoly power in the bulk power market.

Both of these holdings are predicated on the theory that "regulation significantly diminishes the likelihood of major antitrust harm." Pet. App. 18a. As *amici* demonstrate below, however, this central postulate is flawed in both the rate and transmission regulation contexts. Indeed, the FERC itself, upon whom the First Circuit has placed responsibility for preventing anticompetitive injury, has made clear that it "is not strictly bound by, [nor] empowered to enforce, the antitrust laws." *Utah Power & Light Co.*, 45 FERC ¶ 61,095 at 61,283 (1988). The decision below effectively strips the nation's more than 3,000 municipal electric systems and rural electric cooperatives of protection from much of the most egregious anticompetitive conduct. Because the decision below has significant implications for the electric industry as a whole, and because it conflicts in several respects with the decisions of other circuits, this Court should review, and ultimately reverse, that decision.

1. There can be no doubt that the First Circuit's principal determination, *i.e.*, that a utility subject to dual regulation is immune from liability for price squeeze claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, is in square conflict with the Seventh Circuit's decision in *City of Mishawaka* v. *American Elec. Power Co.*, 616

F.2d 976 (7th Cir. 1980) (*Mishawaka II*), *cert. denied*, 449 U.S. 1096 (1981), and the Eighth Circuit's decision in *City of Kirkwood* v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). In both cases, the courts of appeals considered and rejected the argument, accepted by the First Circuit here, that a utility whose wholesale and retail rates are subject to regulation at the federal and state levels, respectively, should be exempt from liability for anticompetitive price squeezes. *Mishawaka II*, 616 F.2d at 985; *City of Kirkwood*, 671 F.2d at 1177-79; see also *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921, 934-35 (2d Cir. 1981) ("where . . . there is a discrepancy between [a fully regulated monopolist's] retail and wholesale rates, a rebuttable presumption arises that the differential has an anticompetitive effect"). Indeed, the First Circuit acknowledged that "reported decisions in three circuit courts of appeal . . . suggest that a price squeeze may be unlawful in the regulated electricity industry" (Pet. App. 23a), and that the court's "reasoning and analysis differ[ed] significantly from that in [these] opinions." *Id.* at 24a.

The reasoning and analysis of these other decisions, moreover, highlights the erroneous assumptions underlying the First Circuit's immunity ruling. By mistakenly equating "dual regulation" by two independent regulatory bodies with "full regulation,"[1] the First Circuit assumed that regulation minimizes the competitive harms that otherwise flow from a price squeeze. Dual regulation as

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[1] See Pet. App. 3a ("does Sherman Act § 2 forbid a governmentally regulated firm with *fully regulated* prices—prices that are regulated at both industry levels—from asking regulators to approve prices that could create a price squeeze?") (emphasis in original); *id.* at 23a ("a price squeeze in a *fully* regulated industry such as electricity will not normally constitute 'exclusionary conduct'") (emphasis added); *id.* at 25a ("a price squeeze will not constitute an exclusionary practice in the context of a *fully* regulated monopoly") (emphasis added).

it exists today, however, is neither all encompassing nor, more importantly, completely effective. As a consequence, it cannot and should not supplant the antitrust laws.

To begin with, there are significant "gaps" in the authority of federal and state regulators, both in terms of their ability to police anticompetitive pricing and in their ability to remedy abuses they detect. Thus, for example, in evaluating price squeeze claims, the FERC does not consider the issue of anticompetitive intent essential to a Section 2 violation. *Missouri Power & Light Co.*, 5 FERC ¶ 61,086 at 61,140 n.17, 61,141 (1978). Moreover, in assessing anticompetitive effects, the Commission does not consider the price differential between retail rates and wholesale rates *as filed*. Instead, it examines the difference between retail rates and the wholesale rates the Commission ultimately finds to be just and reasonable. *Arkansas Power & Light Co.*, 8 FERC ¶ 61,131 at 61,510 (1979). Because the Commission can only suspend filed rates for five months (16 U.S.C. § 824d(e)), and because rate adjudication can often take years, the full magnitude of a price squeeze escapes detection under the Commission's standard of review. See *Cities of Batavia* v. *FERC*, 672 F.2d 64, 88-89 (D.C. Cir. 1982).

Compounding the inadequacies of this review are the limitations of regulatory remedies. The FERC can order utilities to refund only the difference between the wholesale rate as filed and that ultimately found to be just and reasonable. *Southern California Edison Co.*, 40 FERC ¶ 61,371 at 62,168-69 (1987). Such refunds "function to restore to a utility's customers the unlawful overcharges, . . . and do not . . . compensate parties for *actual* harm suffered." *Id.* at 62,169 (emphasis in original); see also *Mishawaka II*, 616 F.2d at 982, 989. Such refunds may "come too late to revive a beleaguered wholesale customer/retail competitor," particularly where the competitor is a small municipal distributor or rural electric cooperative. *Cities of Batavia*, 672 F.2d at 89. The Com-

mission's prospective remedies are equally circumscribed: it can only adjust the wholesale rate within the zone of reasonableness, which may or may not be sufficient to remedy a price squeeze, and it has no authority to order the filing of higher retail rates. See Brief for the United States as *Amicus Curiae* at 12, *Union Elec. Co.* v. *City of Kirkwood*, No. 81-2278 (U.S. December 1982). Because state regulators lack authority to order the filing of lower wholesale rates, the Eighth Circuit correctly concluded that "[only] the antitrust laws can address the entire problem." *City of Kirkwood*, 671 F.2d at 1178.

Perhaps more fundamentally, the First Circuit's dual regulation argument rests on the entirely unexamined assumption that regulatory *authority* corresponds with regulatory *effectiveness*. Practical experience, however, teaches that, even if federal and state regulators possessed the full panoply of investigative and remedial tools, anticompetitive harms would persist.[2] To begin with, the FERC's inability to suspend rates for more than five months, coupled with the often lengthy nature of rate proceedings, permits utilities to circumvent Commission oversight through the simple expedient of subsequent, or "pancaked," filings. See *Mishawaka II*, 616 F.2d at 982. Indeed, in this very case, Edison has successfully manipulated the administrative process such that, since late 1984, it has been able to collect a wholesale rate that the FERC deemed unreasonable in 1988. Pet. at 5 n.1. Moreover, while effective regulation often depends as much on the vigilance of wholesale customers as on the abilities of regulators, such customers lack standing to challenge

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[2] This experience is reflected in a wealth of economic literature. See, *e.g.*, P. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 518.3d (1989) ("insensitivities, gaps, or delays in regulation may enable the regulated monopolist to obtain more than competitive returns or improperly to prejudice actual or potential competition"); T. Moore, *The Effectiveness of Regulation of Electric Utility Prices*, 36 S. Econ. J. 365 (1970).

the retail rates of their suppliers in state regulatory proceedings.

Wholly apart from its unwarranted faith in the efficacy of dual regulation, the decision below ignores the distinctive characteristics of public power. The First Circuit's price squeeze analysis is predicated on the assumption that the relevant economic actors are all driven to maximize profits. Thus, the court of appeals asserted that regulation makes it unlikely that a price squeeze will drive independent distributors such as petitioners from the market because such distributors are themselves monopolists capable of recovering revenue sufficient to ensure their solvency. See Pet. App. 19a (noting that the loss of fringe customers or mobile industrial users to Edison would not threaten petitioners with bankruptcy). Municipal and cooperative systems, however, are not profit-maximizers. Controlled by their customers, they cannot respond to a price squeeze by reflexively raising retail prices simply to ensure their continued viability. Indeed, their existence is entirely dependent on meeting or beating their competitors' retail rates. In the case of municipalities, a single vote of the electorate is all that stands between their preservation and demise, and generally the most important issue in any such election is the retail rate differential.

Moreover, the elimination of municipal and cooperative distributors that have forsworn profit-maximization does not yield two of the benefits the court below associated with price squeezes: the elimination of economically inefficient downstream monopoly profits and the reduction of consumer costs. See *id.* at 15a. On the contrary, to the extent a price squeeze forces out a municipal distributor that prices at minimum unit cost, costs to consumers will rise.

In sum, the First Circuit's dual regulation immunity rests on a number of flawed assumptions concerning both the nature of competition between private utilities and their publicly-owned wholesale customers, and the ability

of federal and state regulators to police and correct abuses that grow out of that competition. Indeed, precisely because price squeeze abuses can occur within the dual regulation framework (see *Mishawaka II*, 616 F.2d at 983-84), antitrust price squeeze actions serve as a necessary complement to the efforts of federal and state regulators.

2. Recognizing that the reasoning underlying its sweeping dual regulation immunity "differ[ed] significantly" from that of its sister courts (Pet. App. 24a-25a), the court of appeals sought to justify its decision on an alternative, and presumably narrower, ground—namely, that Edison lacked monopoly power in any relevant market. *Id.* at 25a. That Edison indisputably possesses monopoly power in both retail sales and in transmission of electricity was, in the court of appeals' view, legally insignificant.

Amici agree with petitioners that the First Circuit erred as a matter of law in wresting from the jury any consideration of Edison's monopoly power in the retail and transmission markets. As petitioners point out with respect to Edison's retail monopoly, § 2 of the Sherman Act proscribes unlawful attempts to *maintain*, as well as to acquire, a monopoly, regardless of whether those attempts are successful and regardless of whether they involve the exercise of monopoly power at a second or different level. The First Circuit's decision to the contrary conflicts with the Seventh Circuit's holding in *Mishawaka II* that a showing of monopoly power at either the wholesale or retail level "brings the monopolization provision of Section 2 into operation." *City of Mishawaka* v. *American Elec. Power Co.*, 465 F. Supp. 1320, 1325 (N.D. Ind. 1979), *aff'd in relevant part*, 616 F.2d 976 (7th Cir. 1982).

Petitioners are also correct that the First Circuit erred in concluding that Edison's transmission monopoly is legally irrelevant. That conclusion did not rest simply on a factbound determination concerning the availability of electricity in New England. Instead, as petitioners point

out (Pet. 11, 18-19), the court of appeals announced a sweeping principle that, *as a matter of law*, a utility's ostensible willingness to wheel power, coupled with the FERC's extremely limited remedial authority over wheeling agreements, broadens the relevant market for generation to include all sources that an importing municipality can reach over the facilities of its supplier. See Pet. App. 25a-28a.

The implications of this holding are enormous. Because few transmission monopolists are likely to be generation monopolists under the First Circuit's test,[3] the court's alternative decision will often be as fatal to antitrust price squeeze claims against utilities as its dual regulation ruling. The court of appeals' categorical redefinition of the generation market, moreover, reflects fundamental misconceptions about the transmission market and the FERC's authority to regulate it. As a consequence, it conflicts with numerous decisions recognizing that market definition is a question for the jury, as well as with decisions in the Second and Seventh Circuits which implicitly recognize that the availability of wheeling does not eliminate market power over generation.

Of crucial importance in this case is the fact that Edison was able to foreclose petitioners' access to alternative sources of energy notwithstanding its wheeling agreement. Indeed, it is undisputed that the five-year notice provision in Edison's tariff allowed Edison 1) to continue to charge petitioners as if it were supplying 100% of their power even after the Towns began receiving power from the New York Power Authority, and 2) to assess a $1 million "adverse financial impact" against the Towns for taking 5% of their power from an alternative source. Pet. App. 36a-37a.

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[3] Indeed, in this case, the First Circuit's test led it to conclude that the relevant market for bulk power included all of New England. Pet. App. 26a. According to the court of appeals, Edison possesses only 12% of this market. *Id.*

Rather than examine the access that Edison's tariff actually afforded petitioners, the court of appeals simply asserted that the Towns were free to seek regulatory relief from any unreasonable or anticompetitive features of Edison's wheeling agreement. *Id.* at 28a. The court's invocation of the FERC's remedial powers is the lynchpin to its alternative holding. It is the court's reliance on the FERC's remedial powers that converts what might otherwise have been a fact-specific determination concerning Edison's market power into a sweeping—and erroneous—rule that whenever a utility offers to wheel power—regardless of the terms and conditions of that offer—the relevant generation market includes, at a minimum, all power produced by utilities connected to the transmission monopolist's system.[4] This sweeping principle, in turn, denies municipal and rural electric systems any antitrust inquiry into whether their transmission-monopolist supplier has raised anticompetitive barriers to market entry.

Notwithstanding the First Circuit's assurances, there is, in fact, considerable uncertainty over whether the Commission possesses authority to alter wheeling arrangements. Several courts have held that the Commis-

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[4] The FERC itself recognizes that voluntary wheeling does not, in and of itself, eliminate a transmission monoplist's market power over generation. In determining the market power such a monopolist wields over generation, the Commission conducts a detailed examination of the terms and conditions of the monopolist's wheeling agreement in order to gauge the wholesale customer's *actual* ability to obtain electricity from other sources. See, *e.g.*, *Pacific Gas & Elec. Co.*, 53 FERC ¶ 61,145 at 61,501-04 (1990); *Utah Power & Light Co.*, 45 FERC ¶ 61,095 at 61,290 (1988) (utility's "wheeling policy is not likely to result in meaningful access . . . . [or] prevent [the utility] from unduly preferring [its] own higher-cost generation over competitors' cheaper alternatives"); *Utah Power & Light Co.*, 43 FERC ¶ 63,030 at 65,345-46, *aff'd in part and rev'd in part*, 45 FERC ¶ 61,095 (1988) ("even with the . . . wheeling policy in place, [the utility] will be able to *effectively* deny use of its transmission system") (emphasis added).

sion may not expand a utility's voluntary commitment to wheel power for another utility except as prescribed by §§ 211 and 212 of the Federal Power Act (16 U.S.C. §§ 824j, 824k),[5] and the FERC has concluded that those provisions do *not* permit it to compel or expand wheeling in order to remedy anticompetitive conduct. See *Southeastern Power Admin.* v. *Kentucky Util. Co.*, 25 FERC ¶ 61,204 (1983); see also *City of Chanute* v. *Kansas Gas & Elec. Co.*, 754 F.2d 310, 313 (10th Cir. 1985). *Amici* believe that the Commission has this authority under §§ 205 and 206 of the Federal Power Act (16 U.S.C. §§ 824d, 824e). However, the Commission itself has repeatedly expressed doubts as to the existence of such authority under these provisions[6] and, to the best

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[5] See *Florida Power & Light Co.* v. *FERC*, 660 F.2d 668, 673-76 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983); *New York State Elec. & Gas Corp.* v. *FERC*, 638 F.2d 388, 400-03 (2d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981); see also *Ottertail Power Co.* v. *United States*, 410 U.S. 366, 374 (1973) (holding, before enactment of §§ 211 and 212, that the FERC lacked the authority to compel wheeling); *Richmond Power & Light* v. *FERC*, 574 F.2d 610, 619-20 (D.C. Cir. 1978) (same).

[6] Counsel for the FERC, for example, recently argued that "the Commission has extremely limited, *if any*, authority under Section 205 of the Federal Power Act . . . to compel . . . an involuntary expansion of a transmission agreement," and that such authority, "*if it exists*, is confined only to those exceptional circumstances where the proponent . . . can demonstrate the need to overcome proven anticompetitive behavior." Brief for Respondent at 20, *Towns of Concord, Norwood, and Wellesley, Massachusetts* v. *FERC*, *aff'd*, No. 90-1179, slip op. (D.C. Cir. Feb. 11, 1991) (emphasis added); See also *Wisconsin Elec. Power Co.*, 46 FERC ¶ 61,019 at 61,113 & n.9 (1989) (although suggesting it has authority, under §§ 205 and 206, to modify contracts to remedy anticompetitive conduct, the Commission stated that ordering transmission "under different terms and conditions than those to which [a utility] has voluntarily agreed . . . . would be inconsistent with the express provisions, statutory history and prior court interpretations of the Federal Power Act"), *aff'd*, 918 F.2d 225 (D.C. Cir. 1990); *Wabash Valley Power Ass'n* v. *Northern Indiana Pub. Serv. Co.*, 23 FERC ¶ 61,179 at 61,390 (1983) ("At present, it is not entirely clear whether we may remedy undue discrimination by ordering wheeling"); *Florida*

of *amici*'s knowledge, has so far declined to exercise such power in the manner the First Circuit suggested it could.[7]

Moreover, even if the Commission possessed such authority, the court of appeals further assumed that the type and cost of non-Edison power, and the type and cost of the non-Edison transmission services available to transport it, make other power ready substitutes for the electricity Edison provides. These assumptions, like those concerning the FERC's remedial authority over wheeling, have little basis in reality. Many municipal and cooperative systems must obtain electricity to meet all of their retail customers' needs. Thus, they must secure both *firm* sources of power and *firm* transmission service to transport that power. See *Southern California Edison Co.*, 40 FERC ¶ 61,371 at 62,173-74 (1987) (alternative sources of power available only on an "interruptible" basis were not substitutes for transmission monopolist's full-requirements power). Moreover, the cost of such power and transmission services *combined* must be competitive with those of the transmission monopolist.

Power & Light, 660 F.2d at 677 ("authority of the Commission to order wheeling as an antitrust remedy . . . is more questionable" than that of a district court). Indeed, at least one Commissioner has concluded that the agency lacks the authority to order wheeling "for reasons of opening further competition with the providing utility." *Southern California Edison Co.*, 47 FERC ¶ 61,196 at 61,681 (1989) (Trabandt, concurring).

[7] *Amici* are aware of only one situation in which the Commission actually invoked its authority under § 206 to modify a term of a transmission agreement that it found to be anticompetitive, but the Second Circuit concluded on appeal that the Commission had exceeded its authority. *New York State Elec. & Gas Corp.*, 638 F.2d at 400-03. *Amici* have found only one decision since the Second Circuit's ruling in which a transmission agreement was modified pursuant to § 206. That decision, which was made by an administrative law judge, was ultimately vacated by the full Commission. *Mississippi Power & Light Co.*, 13 FERC ¶ 63,035 (1980), *vacated*, 20 FERC ¶ 61,406 (1982).

Glossing over these marketplace realities, the court of appeals asserted that power generated throughout New England was available to petitioners because NEPOOL power flowed "freely" among members. That fact, however, says nothing about the types of power or transmission services that petitioners can purchase. As an administrative law judge recently observed, "ad hoc" transmission service negotiations in the New England electricity market have for some time "posed serious difficulties for transmission customers." *Northeast Util. Serv. Co.*, 53 FERC ¶ 63,020 at 65,219 (1990). Even when some form of transmission is obtained, moreover, purchasers are often not guaranteed *firm* service. Thus, for example, "[n]othing in the NEPOOL agreement requires its members to surrender their native load preference [*i.e.*, a preference whereby a wheeling utility favors its own customers over those of a transmission purchaser when capacity constraints arise], and none do." *Id.* at 65,222; see also *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921, 933 (2d Cir. 1981) (NEPOOL agreement has no provision for wheeling firm power). Indeed, for years petitioners have engaged in an unsuccessful attempt to force the New England Power Company ("NEPCO") to provide firm transmission service to carry the firm power that the towns purchase from the New York Power Authority. See *New England Power Co.*, 43 FERC ¶ 63,013 (1988), *aff'd in part and rev'd in part*, 49 FERC ¶ 61,129 (1989), *appealed sub nom. Towns of Concord, Wellesley and Norwood, Massachusetts* v. *FERC*, No. 90-1179, slip op. (D.C. Cir. Feb. 11, 1991).

Those efforts highlight at least two of the difficulties that importing distribution systems face. First, in order to ensure an adequate and reliable supply, such systems must pay for *firm power* even though the "firmness" of the service they ultimately receive may be diminished by a wheeling utility's refusal to provide *firm transmission*. Second, municipal and cooperative systems

must often negotiate with a number of utilities (in the NEPCO case, one producer and two wheeling utilities, NEPCO and Edison), each of whom can add to the cost and complexity of obtaining alternate sources of power. See *Utah Power & Light*, 45 FERC at 61,285 n.125 (noting that certain out-of-state power was not an "economically feasible alternative[] [to that of a transmission monopolist] . . . since . . . wheeling charges would have to be paid to at least three other utilities"). Finally, physical constraints often limit the availability of alternative power. Thus, the FERC has recognized that limitations in transmission capacity and line losses may effectively render distant power unavailable. See *id.* Similarly, the transmission rights necessary to import low-cost power may already be fully utilized. See *Pacific Gas & Elec.*, 53 FERC at 61,502.

For all of these reasons, "defining a geographic market for generation [must] be an empirical task tailored to the utility at issue." J. Lopatka, *The Electric Utility Price Squeeze as an Antitrust Cause of Action*, 31 U.C.L.A. L. Rev. 563, 611 (1983). The First Circuit, however, has forsaken this empirical inquiry in favor of a categorical rule that a utility's apparent willingness to wheel, coupled with the FERC's remedial jurisdiction, expands the relevant market to include all sources of power connected to the utility's transmission grid. This categorical approach conflicts with numerous decisions recognizing that the definition of the relevant market in cases involving electric utilities "is a question of fact to be determined in the context of each case in acknowledgment of the commercial realities of the industry." *Borough of Lansdale* v. *Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3rd Cir. 1982).[8]

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[8] See also *City of Groton*, 662 F.2d at 930 (while "[i]t is inherently difficult to define competition in the electric-power industry" . . . "the essential characteristic of competition . . . [is] that there are or could be alternate suppliers of the same product in the same geographic area") (quotation marks and internal cita-

This approach also implicitly conflicts with decisions in the Second and Seventh Circuits recognizing that the willingness to wheel power, either alone or in conjunction with whatever remedial powers the FERC may possess, does not necessarily broaden the bulk power market to include producers other than the transmission monopolist. Thus, in *Mishawaka II* the Seventh Circuit noted that the transmission monopolist had "advised [its captive municipal wholesale customers] to seek alternative sources of wholesale electricity which [it] offered to 'wheel.'" 616 F.2d at 980. The Seventh Circuit nevertheless affirmed the district court's finding of an anticompetitive price squeeze, observing that "[t]here was no *realistic* substitute source of wholesale power for the municipalities to turn to." *Id.* at 985 (emphasis added). Similarly, in *City of Groton*, the Second Circuit concluded that a captive municipality had stated a valid price squeeze claim notwithstanding the fact that the

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tions omitted); *City of Cleveland* v. *Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1306 (N.D. Ohio 1980) (considering actual competitive forces in defining relevant market); *City of Mishawaka* v. *American Elec. Power Co.*, 465 F. Supp. 1320 (N.D. Ind. 1979) (same), *aff'd in relevant part*, 616 F.2d 976 (7th Cir. 1982); *cf. Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (in Clayton Act case, "the area of effective competition . . . must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can *practicably* turn for supplies") (emphasis added).

Nor is the decision below consistent with *City of Mount Pleasant, Iowa* v. *Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988), which the First Circuit cited in support of its alternative holding. See Pet. App. 27a. In rejecting a claim that a wholesale supplier's anticompetitive wheeling practices gave it monopoly power in the wholesale market, the Eighth Circuit nowhere relied on the customer's ability to challenge improper wheeling practices before the FERC. Rather, the court simply held that the customer had failed to offer evidence that the supplier's practices were unreasonable or anticompetitive. 838 F.2d at 280. Implicit in that holding is the suggestion that, had the customer proffered such evidence, it could have stated a price squeeze claim. Here, of course, petitioners offered precisely such evidence.

utility had "repeatedly announced its willingness to wheel and [had] entered into numerous wheeling contracts." 662 F.2d at 933; *id.* at 934. The First Circuit's contrary approach cannot be squared with these decisions, or with the numerous decisions holding that market definition is a question to be resolved by the factfinder based on the unique circumstances of each case.

3. Even if the Court disagrees with *amici* that the First Circuit's sweeping approach to market definition is worthy of independent review, the court of appeals' alternative holding should not stand as an obstacle to this Court's resolution of the circuit conflict created by the court of appeals' dual regulation immunity holding. In essence, the court of appeals' alternative holding is merely an extension of the principle—central to the dual regulation immunity holding itself—that "regulation makes a critical difference in terms of antitrust harms" and that "regulatory rules, constraints, and practices" effectively prevent a transmission monopolist such as Edison from engaging in predatory conduct. Pet. App. 12a.

Like its misplaced faith in the ability of regulation to prevent a price squeeze, the First Circuit's assumption that regulation can eliminate market power is fundamentally flawed. As *amici* have shown, the Commission has yet to claim the authority to modify wheeling agreements that are anticompetitive.[9] See *supra* at 9-11 & nn. 5-7. Moreover, even if the Commission were to assert such authority, it would often prove an inadequate remedy, both

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[9] Ironically, the Commission recently explained its reluctance to compel wheeling under its §§ 205 and 206 powers by pointing to the fact that "there exist[s] a remedy at law, without resort to the [Federal Power Act], through which aggrieved parties [can] seek relief." *Utah Power & Light*, 45 FERC at 61,282 n.98. As a result of the decision below, wholesale customers in the First Circuit now face the prospect of being whipsawed between a federal agency and the federal courts in a vain effort to obtain a remedy for anticompetitive wheeling practices.

because of the time and expense associated with the Commission's complaint process, and because of circumstances in the generation and transmission markets that are simply beyond the Commission's control. See *supra* at 12-13.

In short, just as the First Circuit's dual regulation immunity rested on an erroneous view of the role and limitations of federal and state regulatory control over electric rates, so too its determination that Edison lacked market power over generation rested on a mistaken conception of the FERC's ability to remedy anticompetitive conduct by transmission monopolists. Because it shares the same infirmities, the alternative holding cannot shield the dual regulation immunity holding from review. Accordingly, *amici* submit that the Court should review the First Circuit's alternative holding in conjunction with any consideration of the dual regulation immunity, for reversal of the latter necessarily would require vacation of the former as well.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 90-1168

In the

Supreme Court of the United States

OCTOBER TERM, 1990

TOWN OF CONCORD, MASSACHUSETTS and
TOWN OF WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE CITIES OF ANAHEIM, RIVERSIDE, BANNING, COLTON AND AZUSA, CALIFORNIA AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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BRIEF FOR THE CITIES OF ANAHEIM, RIVERSIDE, BANNING, COLTON AND AZUSA, CALIFORNIA AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

INTEREST OF THE AMICI CURIAE

Counsel for both petitioners and respondent have consented to the filing of this brief. The consents are being filed with this Court.

The Cities of Anaheim, Riverside, Banning, Colton, and Azusa, California ("Cities") own and operate municipal electric utility systems. Historically, each has been dependent upon Southern California Edison Company ("SCE") for all or substantially all of its bulk power requirements. While that dependency has lessened in recent years, considerable uncertainty exists as to the future, and there is a real possibility that the Cities may again become largely dependent upon SCE for bulk power.

Each of the Cities is surrounded by territory which SCE serves at retail, and each competes with SCE in the ways described by the United States Court of Appeals for the Second Circuit in *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 934 (2d Cir. 1981). During the period 1976-1979, the Cities were victimized by a "price squeeze" imposed on them by SCE, which charged the Cities higher prices at wholesale than it charged its own retail customers for comparable service. The Cities have received partial relief for the price squeeze from the Federal Energy Regulatory Commission ("FERC"),[1] but have been denied relief by the United States District Court for the Central District of California.[2] Both SCE and the Cities have filed petitions for review of the FERC's price squeeze decision with the United States Court of Appeals for the District of Columbia Circuit.[3] An appeal is pending in the United States Court of the Appeals for the Ninth Circuit from the adverse decision of the district court.[4] As victims of a price squeeze and as litigants seeking antitrust protection from such conduct, each of the Cities has a vital interest in the outcome of this litigation and resolution of the present conflict in the law.

The decision of the First Circuit in *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990)("Concord"), *petition for*

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[1] *Southern California Edison Co.*, Opinion No. 284, 40 F.E.R.C. ¶ 61,371 (1987), *on rehearing*, Opinion No. 284-A, 50 F.E.R.C. ¶ 61,275 (1990), *appeals docketed*, No. 90-1236 (D.C. Cir. May 4, 1990), No. 90-1369 (D.C. Cir. July 16, 1990).

[2] *Cities of Anaheim, et al. v. Southern California Edison Co.*, 1990-2 Trade Cases (CCH) ¶ 69,246 (C.D. Cal. 1990), *appeal docketed*, No. 90-56375 (9th Cir. Nov. 15, 1990).

[3] Nos. 90-1236 and 90-1369 in the United States Court of Appeals for the District of Columbia Circuit.

[4] No. 90-56375 in the United States Court of Appeals for the Ninth Circuit.

cert. filed, 59 U.S.L.W. 3526 (U.S. Jan. 22, 1991)(No. 90-1168), effectively denies access to federal courts for antitrust claims that are significant to consumer welfare and that implicate congressional policy, this Court's decisions, and sound public policy. Moreover, the *Concord* decision is in direct conflict with decisions of at least three other circuits. Given the nature of the regulatory environment in which the Cities and SCE function, it is crucial that the First Circuit decision be reversed so that prospective litigants will not be deprived of a forum in which to litigate their claims of abuse of monopoly power.

SUMMARY OF ARGUMENT

Notwithstanding this Court's square holdings that neither federal nor state regulation of an electric utility operates to implicitly repeal the application of the antitrust laws, *see Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973), *and Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976), the First Circuit has fashioned an inflexible rule tantamount to repeal in one of the most active areas of antitrust-regulatory interplay, the price squeeze imposed on a customer-competitor of a wholesale/retail monopolist. This remarkable result is achieved by economic theorizing which predicts that in a regulated context, a price squeeze simply cannot constitute exclusionary behavior violative of Section 2 of the Sherman Act, 15 U.S.C. § 2. If so, three circuit court decisions (and several district court rulings) recognizing and applying the opposite legal proposition, that a price squeeze in the regulated electric utility industry can be an invidious anticompetitive practice requiring antitrust scrutiny, are wrong: *City of Mishawaka v. American Electric Power Co.,* 616 F.2d 976 (7th Cir. 1980) ("*Mishawaka II*"), *cert. denied,* 449 U.S. 1096 (1981); *City of Groton v. Connecticut Light & Power Co.,* 662 F.2d 921 (2d Cir. 1981); *City of Kirkwood v. Union Electric Co.,* 671 F.2d 1173 (8th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983).

The bedrock deficiency of the opinion below is that it believes that competition can or should play no consumer welfare role in the regulated industries. It prefers to dispense with the market in favor of total regulation. In doing so, it flatly contradicts congressional policy, numerous decisions of this Court, and practical wisdom.

The opinion below also relies on regulatory difficulties which might be created by simultaneous antitrust and administrative remedies to justify limitation of access to federal courts. The argument is not sound. Direct regulation of prices by federal and state agencies is not degraded by the imperatives of the competitive process. In fact, competition, which promotes consumer welfare, actually facilitates more effective regulation. Accordingly, the resolution of any actual conflict between antitrust policy and regulation should be left to a case-by-case determination, not an inflexible economic model.

Finally, in arguing that the FERC can solve these problems, the First Circuit misunderstands the process. The FERC cannot restore the affected municipal utility to the status quo. Under present law, a proposed wholesale rate is effective when accepted for filing. During the pendency of the price squeeze, competition is suppressed or eliminated. Without the deterrent of treble damages, costs, attorneys' fees and possible injunctive relief, there is no incentive for the monopolist to refrain from exploiting its smaller competitors and suppressing their competitive capability and zeal. It is the threat of treble damage litigation and only that threat which will deter anticompetitive price squeeze conduct.

In the guise of economic analysis, the First Circuit has created a discordant and extraordinarily dangerous precedent. We urge this Court to grant certiorari and reverse.

ARGUMENT

I.

THE PREDICATE OF THE CONCORD DECISION—THAT A PRICE SQUEEZE PRODUCES NO ANTICOMPETITIVE HARM OR CONSUMER INJURY—IS INCONSISTENT WITH FUNDAMENTAL NATIONAL POLICY AS WELL AS DECISIONS OF THIS COURT AND THREE OTHER CIRCUITS

Despite its frequent disclaimers, *Concord* amounts to a repudiation of the antitrust laws in regulated industry pricing cases. Such a result could not be achieved directly. *See Otter Tail,* 410

U.S. 366; *Cantor*, 428 U.S. 579. There is no jurisprudential basis to allow that result to be achieved indirectly by a predetermination, based on unsubstantiated and fallacious economic theory, that certain conduct simply cannot produce an anticompetitive result. Not only has this Court rejected implied repeal in the electric utility industry (whether regulated by federal or state agencies), lower courts have consistently refused to apply either the doctrine of exclusive jurisdiction, *see City of Mishawaka v. Indiana & Michigan Electric Co.*, 560 F.2d 1314, 1318-21 (7th Cir. 1977)("*Mishawaka I*"), *cert. denied*, 436 U.S. 922 (1978), or the so-called "filed rate" doctrine to price squeeze cases, *see Kirkwood*, 671 F.2d at 1177-79. Yet, the import of *Concord* is to override all these prior reasoned decisions and repeal antitrust as a remedy in favor of regulatory exclusivity. That result should not be accepted.

This Court has held decisively and consistently that antitrust policy is applicable to the electric utility industry, that regulation is not inherently incompatible with competition, and that the FERC and the courts have joint responsibility for effectuating antitrust policy in that industry.

California v. FPC, 369 U.S. 482, 490 (1962), made clear that the courts retain the responsibility for enforcing the antitrust laws. In holding that FPC (now FERC) review of a proposed merger should await the outcome of a pending antitrust action in district court, the Court expressed concern that "antitrust policy whose enforcement Congress in this situation has entrusted to the courts" would "in practical effect [be] taken over by the Federal Power Commission." Later, in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 760 (1973), this Court envisioned a relationship between the FPC and the antitrust laws in which "[c]onsideration of antitrust and anticompetitive issues by the Commission . . . serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings." This Court, therefore, has held plainly at least twice that jurisdiction to resolve antitrust claims arising out of utility conflicts remains with the courts, not the FERC. The First Circuit's decision flatly disregards these teachings.

Moreover, if the *Concord* court's determination that price squeeze almost never results in an anticompetitive effect is valid, then the decision of this Court in *FPC v. Conway Corp.*, 426 U.S. 271 (1976), is meaningless. In *Conway*, this Court directed the FPC to consider the anticompetitive effects of an alleged price squeeze in determining whether, and to what extent, it should approve a proposed wholesale rate increase. The Court ruled that the FPC had to arrive at a rate which was "just and reasonable" and "in doing so it *must* consider the tendered allegations that the proposed rates are discriminatory and anticompetitive in effect." *Id.* at 279 (emphasis added). It is true that this Court, in dealing with what may be characterized as a pleading issue, did not find or even suggest in *Conway* that there were actual anticompetitive effects. But one must assume this Court would not have mandated a futile undertaking. Accordingly, *Conway* must be read as acknowledging the distinct possibility that a price squeeze could have an anticompetitive effect. Read as a guidepost for *Mishawaka II*, 616 F.2d 976, which on a full trial record found actual anticompetitive effects, it is difficult to conceive that the academic exercise of the First Circuit was more than an attempt to deny the obvious: Price squeezes do exist and they can and do pinch.

The irreconcilable conflicts between the *Concord* decision and the *Mishawaka II*, *Kirkwood*, and *Groton* decisions of the Seventh, Eighth, and Second Circuits have been described in detail in the January 22, 1991 Petition for a Writ of Certiorari filed by the Towns of Concord and Wellesley, Massachusetts ("Towns"). The Cities will not repeat that discussion but instead will supplement the Towns' Petition by identifying fundamental flaws in the economic analysis relied upon in the *Concord* decision and, in so doing, demonstrate its inconsistency not only with the decisions of other circuits and of this Court but also with the fundamental principles underlying the antitrust laws.

The positive effects of competition in the electric utility industry have been summarized eloquently by Alfred Kahn:

> We do not consider here whether public enterprise is superior or inferior to private enterprise as an instrument for getting the world's work done . . . . But there is strong evidence in the

> public utility arena that *competition between* the two systems of organization, like competition among private businesses, is highly conducive to improved performance. It may take the form of direct rivalry (for the patronage of the same customers in the same market); or of competition-by-example (where comparisons may be drawn between the performances of private and public enterprises in serving their respective customers, in different markets); or by threat of total displacement (where the management of each is aware that voters are examining its performance with the possibility of substituting one system of control for the other). . . .
>
> The most familiar illustration of this kind of competition in the United States has been in the field of electric power. . . .
>
> . . . The fact is that the competition-by-example or by threat of displacement by public enterprise has greatly improved the performance of this industry. The competition of public with private power has probably been a much more powerful influence than regulation in this respect, and particularly in bringing about dynamic price reduction, sales promotion, and extension of service.

2 A. Kahn, *The Economics of Regulation,* 104-06 (1971)(Footnotes omitted). *See also* Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy,* 72 Colum. L. Rev. 64 (1972)(cited with approval in *Gulf States,* 411 U.S. at 758, 759; *Groton,* 662 F.2d at 929, 930, 934; and *Conway Corp. v. FPC,* 510 F.2d 1264, 1268 (D.C. Cir. 1975), *aff'd,* 426 U.S. 271 (1976)). The economic theory propounded by the *Concord* decision, however, ultimately rests upon disdain for the value of competition in the regulated electric utility industry. An evaluation of examples from the analysis set forth in the *Concord* opinion makes clear that its conclusions are premised upon a profound distrust or disregard for the competitive process. This premise is totally wrong.

The *Concord* court's unwillingness to accept the importance of competition permeates the opinion. First, the decision opines that a "primary-level monopolist might carry out its second-level activities more efficiently than its independent competitors," in which case the elimination of the second-level competitors would

be economically desirable. *Concord* at 15a. [5] The short answer to this example is that permitting the primary-level monopolist to engage in price squeeze is totally unnecessary to achieve the desired result and is equally likely to lead to undesired consequences. If the primary-level monopolist is truly more efficient in the performance of the second-level activities, it should be able to eliminate the less efficient second-level competitors by vigorous competition alone. Moreover, allowing the primary-level monopolist to indulge in price squeeze is at least equally likely to lead to the suppression or elimination of competitors who are *more* efficient in the performance of the second-level activities. The *Concord* court's rationale would allow the primary-level monopolist the unfettered ability to control the existence and vigor of competition at the second level, rather than properly relying on the competitive process to weed out inefficient players. [6]

The *Concord* opinion also suggests that a price squeeze could be economically beneficial if the second-level firm subjected to the squeeze is itself a monopolist. *Concord* at 15a-16a. This paradigm, however, is simply not applicable in the vast majority of cases involving price squeeze in the electric utility industry. Although retail distribution of electricity exhibits natural monopoly characteristics, municipal systems such as the Cities and Towns typi-

[5] Citations to the *Concord* opinion are to the copy of the decision appended to the Towns' January 22, 1991 Petition for a Writ of Certiorari.

[6] In part, the *Concord* court's sanguine attitude can be traced to the notion that the antitrust laws should be indifferent to a monopolist's exploitation of monopoly power because extant power is a fixed sum and thus will result in the same damage regardless of how it is deployed. This theory has been roundly criticized by economists. *See* Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum. L. Rev. 515 (1985). As Kaplow observes, the "fixed sum" perception of power is strongly counterintuitive. His analogy of a monopolist with power to a terrorist on the loose with one stick of dynamite shows the folly of presuming that the law is indifferent to where the power (or dynamite) is placed. *Id.* at 516. Moreover, even some who initially proposed the model have recognized that it may not apply in the context of regulated industries. *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 374 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

cally are surrounded by the service area of the seller utility that is imposing the price squeeze, and their retail rates are constrained by the rates of the surrounding system. *Conway Corp. v. FPC,* 510 F.2d at 1268-69.

Having posited the foregoing fallacious reasons why price squeeze might be a good thing in general, the *Concord* opinion goes on to offer five reasons why the antitrust courts should not be concerned about a price squeeze in the context of a regulated industry. Those reasons are equally invalid and equally inconsistent with the fundamental concern for the competitive process that is the bedrock of antitrust policy.

The *Concord* decision first asserts that in a regulated industry, price squeeze is unlikely to have adverse effects because the regulators directly control prices as well as market entry and exit. *Concord* at 18a-19a. These arguments rest on the discredited assumption that competition has no role in the electric utility industry and are irreconcilable with this Court's rulings in *Conway,* 426 U.S. 271, and *Otter Tail,* 410 U.S. 366. Contrary to the circuit court's apparent assumption, price regulation is not a perfect science, as this Court expressly recognized in *Conway,* 426 U.S. at 278-79. Moreover, the circuit court's rationale ignores the fact that competition can induce improvements in productive efficiency, resulting in lower costs and, indirectly, lower prices. [7] The *Otter Tail* case also refutes the suggestion that regulators can prevent a monopolist utility from creating barriers to entry. In that case, the Court found that Otter Tail had done exactly what *Concord* claims regulation would prevent a utility from doing, *i.e.,* creating barriers to entry by refusals to deal and other means.

The *Concord* court's observation that regulators must approve a take-over of a municipal system also reflects a fundamental misunderstanding or disregard of the competitive process. The circuit court apparently assumes that so long as competitors are permitted to survive, a price squeeze works no harm on the competitive process. But, just as the elimination of competitors does not necessarily signify harm to the competitive process, *cf. Bruns-*

[7] Even when regulation succeeds in setting prices equal to costs, it has difficulty in determining whether costs are as low as feasible.

wick Corp. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477 (1977), the continued survival of competitors does not negate injury to competition. If a price squeeze prevents competitors from competing as vigorously as they could have in the absence of price squeeze, the competitive process is harmed, even if the competitors manage to survive.

In addition to its supply relationship with each of the Cities, SCE serves at retail the territory surrounding these municipal systems. SCE competes with the Cities in the retail market despite the regulation of its retail electricity prices by the California Public Utilities Commission and oversight of interstate power transactions by the FERC. Not only is there franchise competition between these entities for who will secure and retain a franchise to serve particular areas, but yardstick competition also exists by virtue of a regulatory and political process that compares each utility's performance against the others'. The efficiencies of compared systems provide regulators with insights regarding the appropriate level for each monopolist's rates and returns, and the political and economic pressures of customers' reactions encourage efforts to enhance efficiencies and reduce costs. The mere existence of comparable municipal utilities operates as a check on the necessarily imperfect regulatory systems that attempt to ensure that consumers receive the highest quality of service at the lowest possible cost. Contrary to the suggestion of *Concord*, therefore, competition is not inconsistent with the regulatory infrastructure of this industry, but in fact facilitates effective regulation.

Where a neighboring franchisee controls its competitor's supply of wholesale power, it can virtually dictate the performance of the municipal system by manipulating its wholesale price of power. Further, it can evade the regulatory and competitive checks provided by yardstick competition and erode customer confidence in the municipal system. This is precisely what happened to the Cities during the period 1976–1979.

The second and third reasons advanced by the *Concord* opinion for refusing to address a price squeeze in a regulated industry are

equally inconsistent with this Court's decisions and with antitrust policy, as well as being self-contradictory. The second reason suggests that if the prices set by regulators accurately reflect costs, only inefficient distributors will be harmed by a price squeeze. *Concord* at 19a. The third reason, however, argues that a prohibition against price squeeze will encourage utilities to set retail prices too high. *Id.* at 20a. Thus, the second reason assumes, contrary to the *Conway* decision, 426 U.S. 271, that regulation is able to determine costs perfectly and precisely, while the third reason assumes that regulation will not be effective in constraining retail rates. More importantly, *both* the second and third reasons presume that retail competition has no value in encouraging efficiency or restraining prices.

The fourth and fifth reasons argued in support of the *Concord* "abstention" doctrine invoke considerations of administrative difficulty, regulatory flexibility, and judicial economy. Again, these arguments are fundamentally incompatible with antitrust policy. While it is true that price squeeze claims raise difficult issues, that is no less true with respect to many (or most) antitrust claims, as well as other complex litigation.[8] With respect to the potential for interference with regulatory policy, the *Otter Tail* decision, 410 U.S. 366, balanced the interest in antitrust enforcement against the possibility of conflicts with regulatory policy and concluded that a theoretical conflict should not be permitted to interfere with the application of the antitrust laws. Rather, actual conflicts between regulatory imperatives and antitrust policy should be resolved on a case by case basis. *Otter Tail,* 410 U.S. at 376-77.

Finally, the *Concord* court's contention that there is an adequate administrative remedy for price squeeze is inexcusably myopic for all of the reasons set forth in *Mishawaka I,* 560 F.2d at 1324-25, and at pages 15-17 of the Towns' Petition. Under *Conway,* 426 U.S. 271, the FERC is obliged to consider the effects on competition of the relationship between a utility's proposed wholesale rates and its retail rates. But the remedy available from

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[8] For example, predatory pricing and price discrimination claims also involve inquiries into the relationship between prices and costs.

the FERC is limited to refund of the amount of the price squeeze, plus interest, many years after the fact.[9] The FERC cannot remedy other types of antitrust injury, such as the ones described by the Seventh Circuit in *Mishawaka II*, 616 F.2d at 989. Moreover, even if the FERC were to act promptly to reduce a proposed wholesale rate to diminish or even eliminate a price squeeze, it cannot enjoin the filing of a new discriminatory wholesale rate proposal. Thus, without the deterrent effect of potential liability for treble damages and attorneys' fees and costs or the possibility of injunctive relief under the antitrust laws, utilities could impose one price squeeze after another with total impunity. It is a "no lose" proposition for the monopolist-supplier and a "no win" situation for the victimized wholesale customer-competitor.

To permit, indeed to encourage, deliberate anticompetitive conduct of a monopolist seems unthinkable. *Concord* cannot be harmonized with the fundamental principles of antitrust policy, with the decisions of this Court, or with *Mishawaka II*, *Groton*, or *Kirkwood*. These conflicts should be resolved by granting certiorari to examine the wisdom and propriety of the *Concord* decision.

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[9] For example, almost fifteen years after this Court's decision in *Conway*, the Cities in 1990 finally received FERC-ordered refunds for a price squeeze that occurred in 1976. *See, Southern California Edison Co.*, Opinion No. 284, 40 F.E.R.C. ¶ 61,371 (1987), *on rehearing*, Opinion No. 284-A, 50 F.E.R.C. ¶ 61,275 (1990), *appeals docketed*, No. 90-1236 (D.C. Cir. May 4, 1990), No. 90-1369 (D.C. Cir. July 16, 1990). Both the Cities and SCE have petitioned for review of Opinion Nos. 284 and 284-A. The Cities maintain on appeal that the FERC seriously understated both the magnitude and the duration of the price squeeze, while SCE argues that no price squeeze relief was justified.

II.

CONCLUSION

For the reasons set forth herein, we urge the Court to grant the Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TOWN OF CONCORD, MASSACHUSETTS and
TOWN OF WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL ASSOCIATION OF GAS CONSUMERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A *WRIT OF CERTIORARI*

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MOTION OF NATIONAL ASSOCIATION OF GAS CONSUMERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

The National Association of Gas Consumers ("NAGC") respectfully moves pursuant to Rule 37.2 for leave to file the attached brief *amicus curiae* in this case. Petitioners have consented to NAGC's filing of this brief. The consent of the respondent was requested but refused.

Statement of Interest

NAGC is a nonprofit organization representing municipally-owned and operated gas distribution systems located throughout the United States. The Association through its direct and affiliate members represents approximately 200 systems. NAGC members either purchase natural gas or rely upon transportation service, or obtain both, from natural gas companies regulated by the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act of 1938, 15 U.S.C. §§ 717, *et seq.*, a companion statute to the Federal Power Act of 1938, 16 U.S.C. § 791, *et seq.*[1]

NAGC members, as municipally-owned electric and natural gas distribution systems, compete at the retail level with investor-owned utilities which typically control essential transmission facilities. As such, the NAGC and its members, are directly affected by the court of appeals' decision, and have a unique perspective and interest which will aid this Court in its consideration of the issues herein.

Reasons For Granting Leave

This case involves an important decision involving the application of the Federal Antitrust laws, in particular § 2 of the Sherman Act, 15 U.S.C. § 2, to an industry subject to regulation by the Federal Energy Regulatory Commission. The NAGC members are de-

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[1] Federal Power Act and Natural Gas Act are *in pari materia* and relevant provisions of each are construed interchnageably. Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981); Permian Basin Area Rate Cases, 390 U.S. 747, 820-821 (1968); FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956).

pendent on interstate gas pipeline systems for the transportation or purchase of their wholesale gas supplies for their distribution systems. The United States Court of Appeals for the First Circuit held that a utility which is regulated by the FERC at the wholesale level and by state regulatory agencies at the retail level, is immune from liability under § 2 of the Sherman Act with respect to a price squeeze imposed by it on its wholesale customers. As demonstrated by the brief attached hereto, the dual regulation immunity decision should be reviewed, not only because it conflicts with decisions in the Eighth, Seventh and Second Circuits dealing with electric utilities, but because its rationale would also appear to apply to natural gas companies subject to FERC regulation. As such, members of the NAGC could be denied important protection for fair and equal competition with their pipeline suppliers presently available under § 2 of the Sherman Act.

Second, the First Circuit's decision adopts a novel narrow definition of monopoly power, which would have the effect of further immunizing interstate gas pipelines from accountability under the Sherman Act and thereby exempting such FERC-regulated utilities from the essential facilities doctrine. In essence, the court ignored the admitted monopoly power of the defendant over transmission and at the retail level. The jury's verdict of monopoly control under § 2 was replaced by a legal ruling that a plaintiff under the antitrust laws must show monopoly control by the defendant at the production level, thereby expanding the relevant geographic market to encompass all potentially accessible production sources, and thereby insuring immunity from § 2. Thus, antitrust plaintiffs

subject to an essential facility must now prove monopoly power at the producer or generational level regardless of admitted monopoly control over the facilities. This finding jeopardizes all municipally-owned utilities that are dependent on essential facilities to receive energy supplies from outside sources. The court's holding on the requisite proof for monopoly power creates an exception to the Sherman Act which is unprecedented and conflicts with many other circuit decisions.

NAGC, as a representative of municipally-owned utilities, is directly affected by the lower court's decision. Acceptance of NAGC's brief *amicus curiae* will lend a unique perspective and information to this court in considering the issues herein.

CONCLUSION

WHEREFORE, for the foregoing reasons, NAGC respectfully requests that the following brief *amicus curiae* in support of petitioners be accepted for filing.

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BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF GAS CONSUMERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A *WRIT OF CERTIORARI*

INTEREST OF *AMICUS CURIAE*

The National Association of Gas Consumers ("NAGC") is a nonprofit organization representing municipally owned and operated gas distribution systems located throughout the United States. The Association through its direct and affiliate members represents approximately 200 systems. These gas sys-

tems purchase natural gas and/or rely upon transportation service from natural gas companies regulated by the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act of 1938, 15 U.S.C. §§ 717, a companion statute to the Federal Power Act of 1935, 16 U.S.C. §§ 791, et seq.[1]

The members of NAGC are dependent on interstate gas pipeline systems for transportation or purchase of their wholesale gas supplies needed for their distribution systems. Many of the municipal systems purchase firm requirements gas supplies from interstate pipelines, which compete with them for retail customers. Since the interstate pipelines are subject to dual regulation by FERC and the states, similar to Boston Edison Company, the principles of the decision by the First Circuit Court of Appeals, immunizing these sales from price squeeze consideration under § 2 of the Sherman Act also applies to these gas systems. Further, reasonable access to the interstate pipeline facilities either for the purchase of firm requirements gas or for access to other competitive supplies of natural gas, is essential for these small municipal systems to continue to provide the lowest cost supply of natural gas to their communities. The decision of the court of appeals in narrowing the definition of monopoly power below applicable precedents, could improperly immunize the interstate pipeline industry from the essential facilities doctrine, contrary to the public interest.

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[1] Federal Power Act and Natural Gas Act are *in pari materia* and relevant provisions of each are construed interchangeably. Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981); Permian Basin Area Rate Cases, 390 U.S. 747, 820-821 (1968); FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956).

ARGUMENT

The decision below takes the case from the jury on the strength of false premises springing from a misperception of rate regulation as a panacea for price squeeze liability under Section 2 of the Sherman Act. This antitrust immunity theory is advanced on two interrelated grounds. First, the court of appeals finds as fact that a vertically integrated utility whose rates are subject to regulation at both the retail and wholesale levels is so "completely regulated," as to be forestalled from impairing competition by price squeezing wholesale customers who compete with it for retail sales. 915 F.2d at 19, 28. Secondly, the court exempts such dual regulated utilities from the essential facilities doctrine, by rejecting acknowledged evidence of the defendant's transmission monopoly and barriers to reasonable access thereto. 915 F.2d at 29-31. The latter basis for the decision substitutes for the jury's finding an absolute requirement that a price squeeze plaintiff show monopoly control by the defendant at the wholesale generation (production) level, under a mandatory requirement that the relevant geographic market be one which must encompass all potentially accessible generation sources. 915 F.2d at 29-30.

These flawed conclusions by the First Circuit are contrary to this Court's precedents, in conflict with decisions of other circuit courts of appeal, and if allowed to stand would in practical application afford dual regulated utilities opportunities to injure competition and drive up consumer prices. Accordingly, as elaborated upon in the discussion below, NAGC urges that *certiorari* be granted in the instant case.

I. THE FACT OF REGULATION DOES NOT ELIMINATE OR REDUCE THE ANTICOMPETITIVE POTENTIAL OF PRICE SQUEEZE, IT ENHANCES IT

The primary reason for the lower court's erroneous conclusion that regulation *per se* eliminates the practical possibility of an unlawful price squeeze is its total misunderstanding of the role of regulation in a price squeeze situation. Regulation does not impose any substantial limitation on a utility's power to set and manipulate its rates for anticompetitive purposes. Rather, the existence of dual regulation increases a utility's ability to manipulate.

The decision asserts that the law permits a utility to only recover its costs and earn a reasonable profit. 915 F.2d at 25-26. From this premise, it goes on to conclude: "An integrated utility's prices are likely to squeeze independent distributors who buy from it at wholesale only if those distributors operate less efficiently, *i.e.*, at higher costs." *Id.* at 26. However, as will be shown hereinafter, the limitations of regulation on a utility's price squeeze capabilities are so small that a distributor could operate considerably more efficiently than its wholesaler and still be undercut by that wholesaler to an almost unlimited degree.[2]

First, the proposition that the law does not permit the utility to recover more than its costs plus a rea-

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[2] The court also ignored utilities' ability to exploit the wholesale/retail regulatory gap by determining the timing and amount of their rate filings. City of Kirkwood v. Union Electric Company, 671 F.2d 1173, 1177-78 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); City of Mishawaka v. Am. Elec. Power Co., 616 F.2d 976, 983-84 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); Cities of Anaheim v. Southern California Edison Co., 1990-2 Trade Cases ¶ 69,246 at 64,900 (C.D. Cal. 1990).

sonable profit is untrue. The inability of regulators to control prices, and the consequent importance of antitrust remedies, is well established:

> Yet insensitivities, gaps, or delays in regulation may enable the regulated monopolist to obtain more than competitive returns[43] or improperly to prejudice actual or potential competition in the regulated market or in a related market.[44] Such results at the hands of a regulated monopolist are traditional concerns of § 2.

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[43] *See generally* S. Breyer, Regulation and Its Reform (1982); T. Moore, The Effectiveness of Regulation of Electric Utility Prices, 36 S. Econ. J. 365 (1970)

[44] *See* Ch. 7D.

P. Areeda & H. Hovenkamp, Antitrust Law ¶ 518.3d (Supp. 1989). FERC price regulation clearly does not limit a utility to collection of actual costs plus a reasonable profit. FERC regulation of wholesale prices of utilities such as Edison is based exclusively on estimated costs for a hypothetical future test year. These prices are then applied for what can be a substantial period of time. For example, in this case Edison's rates to the Towns for the entire 1985 to 1990 period were based on one estimated test period set of data. The FERC itself has acknowledged that this estimated cost policy gives a utility the incentive and capability to manipulate its estimates to recover more than its actual costs. *Public Service Company of New Mexico*, Opinion No. 203, 25 F.E.R.C. ¶ 61,469 at 62,055 (1983).

Further, it may deliberately allow prices in excess of costs. For example, for the period 1971 through 1986 the Commission gave all gas pipelines the benefit of a "short supply" declaration pursuant to the Revenue Act of 1971. This permitted the pipelines to keep all the benefits of investment tax credits created pursuant to that Act. This also constituted a specific allowance for the pipeline industry to recover more than their costs, plus a reasonable return. Ratemaking Treatment of Investment Tax Credit for Natural Gas Pipeline Companies, Order No. 440, 33 F.E.R.C. ¶ 61,295 (1985).

But even more important to the ultimate impact of regulation on price squeeze is the issue of rate design and cost allocation. Once a utility has determined its overall "estimated cost" it must allocate those costs as between its various wholesale and retail customers and employ a "rate design." The Commission's policy on rate design is "the Commission must find the rate design filed by a utility to be unjust, unreasonable or otherwise unlawful in order to set aside the filed rate design and order the utility to adopt another rate form even though another rate design may be even better than the one filed by the utility." *New England Power Company*, Opinion No. 352-A, 54 F.E.R.C. ¶ 61,055, *slip op.* at 2 (January 24, 1991).

Thus, pursuant to the FERC's ratemaking policies, a utility has a broad number of estimating, rate design and allocation methodologies from which it could choose in filing and then collecting a rate for a long period of time. If it desires to put any particular customer in a price squeeze, it simply selects the methodology which will raise the cost and billing allocations to that customer or the entire wholesale

customer class and lower it to other customers or the entire retail customer class. Contrary to the lower court's decision, no distributor, no matter how efficient, stands a chance against a utility with an anticompetitive intent.

Other circuit courts of appeal have come to the correct conclusion as to the relationship between price squeeze and dual regulation. Indeed, the court of appeals itself stated (915 F.2d at 28-29) that its holding was in direct conflict with the Seventh Circuit's decision affirming a price squeeze judgment against an electric utility in *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 985 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) (As to "an industry subject to both federal and state regulation . . . we do not believe that that circumstance justifies an antitrust exemption . . . . "). The court below also acknowledged that its "reasoning and analysis differ [ ] significantly from that in" a number of other opinions, including the Eighth Circuit's decision in *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), and the Second Circuit's decision in *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981). *Id.* After analyzing this Court's decisions, including *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) and *FPC v. Conway Corp.*, 426 U.S. 271 (1976), and discussing the limitations on federal and state ratemaking authority, the Eighth Circuit held that "a municipality's price squeeze claim is cognizable under the antitrust laws." *City of Kirkwood* at 1177 n.8.

II. THE DECISION BELOW RELATING TO MONOPOLY CONTROL CONFLICTS WITH THIS COURT'S DECISIONS AND THOSE OF OTHER CIRCUIT COURTS OF APPEALS ON THE ESSENTIAL FACILITIES DOCTRINE

This Court has established that the "strategic dominance in the transmission of power" possessed by a utility regulated under the Federal Power Act is relevant to the issue of monopoly power under Sherman Act § 2. *Otter Tail Power Company v. United States*, 410 U.S. 366, 377-79 (1973). The court of appeals holds to the contrary by finding that the plaintiffs "failed to show that Boston Edison possessed monopoly power in the relevant market," while also recognizing:

> In this case, it is undisputed that Boston Edison has a (lawful) monopoly at one level of the electricity industry, namely transmission, for a given area normally can support only one transmission system, *see, e.g.*, Meeks, 72 Colum. L. Rev. at 87, and Edison owns the transmission grid covering the area that includes Concord and Wellesley.

915 F.2d at 29.

This unwillingness by the court of appeals to permit the conceded transmission monopoly (as well as retail monopoly) to be used as part of a monopolization claim is clearly in conflict with *Mishawaka*, 616 F.2d 976, and cases decided by the D.C., Third, Fourth, Eighth and Ninth Circuits.[3] The court of appeals ins-

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[3] Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); Structure Probe, Inc. v. Franklin Institute, 450 F. Supp. 1272, 1286 (E.D. Pa. 1978), *aff'd*

ists upon (1) proof of monopoly power over production in (2) a geographic market broad enough to encompass all production sources potentially accessible through Edison's transmission system, all to the further disregard of barriers to entry erected by Edison. 915 F.2d at 29, 30. This holding itself warrants review since it creates a judicial exemption from the antitrust laws for retail and transmission monopolists.

The holding of the court of appeals refusing to recognize the admitted transmission monopoly clearly conflicts with the holdings of other courts as to essential facilities doctrine. *Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585, 592, 594 (1985) (Denial of access found despite defendant's offer to grant access if plaintiff would accept 12.5% split of multi-mountain lift ticket revenues); *Consol. Gas Co. of Florida v. City Gas Co.*, 880 F.2d 297, 299 (11th Cir. 1989), *aff'g* 665 F. Supp. 1493, 1512 (S.D. Fla. 1987) (Refusing to transport gas except at prices in excess of cost amounted to a refusal to deal); *Woods Exp. and Pet. Co. v. Al. Co. of America*, 438 F.2d 1286, 1301, 1308-09 (5th Cir. 1971) (Pipeline's refusal to transport natural gas unless an overriding royalty was paid held equivalent to be an absolute refusal); *City of Chanute v. Kansas Gas & Electric Company*, 564 F. Supp. 1416, 1419, 1423-24 (D. Kan. 1983), aff'd,

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mem., 595 F.2d 1214 (3d Cir. 1979); Greenville Publishing Co., Inc. v. Daily Reflector, Inc., 496 F.2d 391, 397 (4th Cir. 1974); Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983). *See also*, Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986).

754 F.2d 310 (10th Cir. 1985) (Refusal to wheel unless customer agreed to new contract that provided increased rates treated as a refusal to wheel).

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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